SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1262 69

PANHANDLE EASTERN PIPE LINE COMPANY,
*Appellant,*

*vs.*

THE PUBLIC SERVICE COMMISSION OF INDIANA, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF INDIANA

# STATEMENT AS TO JURISDICTION

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# INDEX

## Subject Index



## Table of Cases Cited

## Statutes Cited



* The abbreviation "Ind. Acts" is used to indicate the official publication entitled "Laws of the State of Indiana."

MISCELLANEOUS

IN THE SUPREME COURT OF INDIANA

# No. 28225

PANHANDLE EASTERN PIPE LINE COMPANY,
*Appellant,*

*vs.*

THE PUBLIC SERVICE COMMISSION OF INDIANA, LEROY E. YODER, LAWRENCE E. CARLSON, AND LAWRENCE W. CANNON, AS MEMBERS OF THE PUBLIC SERVICE COMMISSION OF INDIANA; INDIANA GAS & WATER COMPANY, INC., CENTRAL INDIANA GAS COMPANY, NORTHERN INDIANA PUBLIC SERVICE COMPANY, KOKOMO GAS & FUEL COMPANY, SOUTHERN INDIANA GAS & ELECTRIC COMPANY, AND GREENFIELD GAS COMPANY, INC.

APPEAL FROM THE RANDOLPH CIRCUIT COURT

## STATEMENT AS TO JURISDICTION ON APPEAL

In compliance with Rule 12, as amended, of the Supreme Court of the United States, Panhandle Eastern Pipe Line Company, appellee-appellant, presents herewith its statement particularly disclosing the basis upon which the Supreme Court of the United States has jurisdiction upon

appeal to review the judgment of the Supreme Court of Indiana.

## I. Nature of Case and Statutory Provisions Sustaining Jurisdiction

The jurisdiction of the Supreme Court of the United States to review by direct appeal the judgment of the Supreme Court of Indiana entered in this cause is conferred by Section 237 of the Judicial Code, as amended (36 Stat. 1156, 43 Stat. 937, 45 Stat. 54, 28 U. S. C. 344 (a)).

In this cause there is drawn in question the validity of statutes of the State of Indiana on the ground of their being repugnant to the Constitution of the United States, and the judgment appealed from sustains the validity of said statutes and was rendered by the highest court of the State of Indiana in which a decision in the suit could be had.

The facts from which this appeal arises may be briefly stated as follows:

Appellee-appellant produces natural gas in Kansas and Texas and purchases natural gas produced by others in Texas, Oklahoma and Kansas. It owns and operates a pipe line system extending from these states through the states of Kansas, Missouri, Illinois, Indiana, Ohio, and Michigan, through which it transmits natural gas which it sells and delivers to local distributing companies for resale to local consumers, and to large industrial consumers under individual contracts. Prior to October 13, 1944, it was selling and delivering directly to one large industrial consumer in Indiana, Anchor-Hocking Glass Corporation, at Winchester, Indiana. The quantities delivered to said consumer were much larger than the amounts purchased by some of the smaller distributing companies for resale. Appellee-appellant has at no time complied or attempted to comply with the requirements of the Indiana Public Service Com-

mission Act (Ind. Acts 1941, c. 101, p. 255; Ind. Acts 1945, c. 46, p. 92; Burns' Indiana Statutes Annotated, 1933, Sections 54-101, *et seq.*). On October 13, 1944, purporting to act under the authority of Burns' Indiana Statutes Annotated, 1933, Section 54-112, Ind. Acts 1941, c. 101, sec. 5, p. 259 (authorizing summary investigations on the Commission's own motion of any matter relating to any public utility), the Public Service Commission of Indiana ordered a formal investigation of appellee-appellant's right to supply gas for consumption within the State of Indiana without complying with the requirements of the Indiana Public Service Commission Act relating to public utilities.

On November 21, 1945, said Commission entered an order in which it asserted jurisdiction to regulate rates and service for appellee-appellant's direct sales to industrial consumers in the State of Indiana and required appellee-appellant to file tariffs covering rates, rules and regulations appertaining to such sales and certain reports, as more particularly shown in the order set forth in full in the Appendix hereto.

On January 11, 1946, appellee-appellant filed in the Randolph Circuit Court of Randolph County, Indiana, an action against appellant-appellee, the Public Service Commission of Indiana, to vacate and set aside said order and enjoin the enforcement thereof. The complaint alleged that said order and any statute of the State of Indiana purporting to authorize such order, if applied to the business of appellee-appellant, unlawfully regulate and burden interstate commerce in violation of Article I, Section 8 (3) of the Constitution of the United States.

On February 5, 1946, during the pendency of the action, appellants-appellees Central Indiana Gas Company, Greenfield Gas Company, Inc., Northern Indiana Public Service Company, Kokomo Gas & Fuel Company, Indiana Gas & Water Company, Inc., and Southern Indiana Gas & Elec-

tric Company, all being gas company utilities engaged in the local distribution of natural gas purchased from appellee-appellant, filed petitions for leave to intervene in the proceedings on the ground that each had a direct interest in the issue of appellant-appellee Commission's power and authority to regulate the distribution and sale of natural gas to industrial consumers, and that each would be directly affected by the determination thereof. These petitions were granted on February 13, 1946, and thereafter the intervening utilities actively participated in the proceedings to uphold the validity of appellant-appellee Commission's orders.

On April 9, 1946, while said cause was pending, said Commission entered a supplemental order in which it held that filing of the various matters specified in the original order for information purposes only, as appellee-appellant had offered to do, would not be a compliance with said order and reasserted jurisdiction to regulate rates and service with reference to direct sales and deliveries to industrial consumers. This action was brought into the pending cause by supplemental complaint.

On May 11, 1946, the Randolph Circuit Court rendered judgment vacating and setting aside said order of November 21, 1945 and the order supplemental thereto dated April 9, 1946, and enjoining the enforcement thereof. (The above facts are substantially stated in the opinion of the Supreme Court of Indiana appended hereto, Appendix "A", at pp. 24 to 27.)

Thereafter, on February 5, 1947, the Supreme Court of Indiana entered its judgment reversing the judgment of the Randolph Circuit Court, with instructions to enter judgment denying appellee-appellant the relief sought on the ground that, notwithstanding the order of said Public Service Commission of Indiana constituted an assertion of regulatory jurisdiction with respect to rates and services of appellee-appellant's business of selling and delivering

direct to large industrial consumers in Indiana natural gas transported into Indiana in interstate commerce, such sales being for consumption are subject to state regulation because of paramount local, rather than national, interest.

## II. State Statutes, the Validity of Which Is Involved

The state statutes, the validity of which was drawn in question and sustained in this suit, are:

(1) an order issued by the Public Service Commission of Indiana, November 21, 1945, as supplemented by a further order of said Commission issued April 9, 1946, asserting and exercising jurisdiction and authority to regulate, especially with respect to rates and service, appellee-appellant's interstate sales and deliveries, under individual contracts, of natural gas transported by pipe line from Texas and Kansas and delivered in Indiana directly to large industrial consumers.

(2) The Public Service Commission Act of Indiana (Ind. Acts 1941, c. 101, p. 255; Ind. Acts 1945, c. 46, p. 92; Burns' Indiana Statutes Annotated, 1933, Sections 54-101 *et seq.*) and particularly that paragraph of Section 54-105 (Ind. Acts 1933, c. 190, Sec. 1, p. 928) which defines a "public utility" subject to the provisions of the Act and Section 54-601A (Chapter 53 of the Acts of the General Assembly of Indiana of 1945, referred to as "Section 97A of the Public Service Commission Act" by the Commission in its order).

(1) The Commission's order issued November 21, 1945, and the supplement thereto issued April 9, 1946, are set forth in full as Appendix "C" and Appendix "D," respectively, hereto at pp. 61 to 161. The order, as supplemented, constitutes a "statute" within the meaning of the term as used in Title 28 U. S. C. Sec. 344(a). *Williams* v. *Bruffy*, 96 U. S. 176, 183; *King Mfg. Company* v. *City of Augusta*, 277 U. S. 100; *Ex Parte Williams*, 277 U. S. 267; *Northwestern Bell Telephone Company* v. *Nebraska State Railway Commission*, 297 U. S. 471.

While the original order issued November 21, 1945, required appellee-appellant only to file its tariffs, rates and certain reports and reserved for future consideration Commission action in the event that appellee-appellant should seek to make direct sales and deliveries to industrial consumers in Indiana without a certificate of public convenience and necessity issued by the Commission, it specifically asserted jurisdiction to regulate such sales with respect to rates and service, and the supplemental order issued April 9, 1946 established unqualifiedly that the Commission was not merely seeking information from appellee-appellant but was asserting complete and full authority to regulate its interstate business in Indiana. Furthermore, the Supreme Court of Indiana, construing the Commission's order, said (Appendix "A", pp. 27-28):

> "We hold that the orders of the Commission, in this case, constitute an unequivocal assertion of power and jurisdiction to regulate and fix rates upon sales of natural gas from appellee's interstate pipe line direct to large industrial consumers of gas in Indiana, and that they were sufficient to present to the trial court and to this court the question of the jurisdiction and power of appellant Commission to fix rates for such sales and service and to make regulations with reference to same."

(2) The Public Service Commission Act of Indiana provides a complete scheme of regulation of "public utilities" and vests authority in the Public Service Commission of Indiana to administer the Act and to issue final legislative orders having the force of law with respect to the business of persons coming within the term "public utility" as defined in Ind. Acts 1933, c. 190, sec. 1, p. 928; Sec. 54-105, Burns' Indiana Statutes Annotated, 1933, Vol. 10, p. 335. On this section of the Act, the Commission based its jurisdiction to regulate Panhandle's interstate sales of natural gas to industrial consumers in Indiana. The Supreme

Court of Indiana construed this section of the Act as sustaining such jurisdiction (see quotations from opinion, post pp. 14-15). The pertinent paragraphs of this section of the Act read as follows:

> "Section 54-105 (12672). *Definitions of Terms—Short title of act.*—The term 'public utility' as used in this act shall mean and embrace every corporation, company, individual, association of individuals, their lessees, trustees, or receivers appointed by any court whatsoever, that now or hereafter may own, operate, manage or control any street railway or interurban railway or any plant or equipment within the state for the conveyance of telegraph or telephone messages, or for the production, transmission, delivery or furnishing of heat, light, water or power, or for the furnishing of elevator or warehouse service either directly or indirectly to or for the public, but said term shall not include a municipality that may now or hereafter acquire, own, or operate any of the foregoing facilities.
>
> "The term 'utility' as used in this act shall mean every street railway or interurban railway, and every plant or equipment within the state used for the conveyance of telegraph and telephone messages, or for the production, transmission, delivery or furnishing of heat, light, water or power, or for the furnishing of elevator or warehouse service either directly or indirectly to the public."

Section 54-601A (Chapter 53 of the Acts of the General Assembly of Indiana of 1945) was, as stated in the opinion of the Supreme Court of Indiana (see quotation from opinion, post p. 15), "aimed directly at the natural gas business, and by the act a 'gas utility' was defined to mean and include 'any public' utility selling or proposing to sell or furnish gas directly to any consumer or consumers within the State of Indiana for his, its or their domestic, commercial or industrial use.'" Since it is comparatively short, this particular section of the Public Service Com-

mission Act of Indiana is set forth in full as Appendix "E" hereto at pp. 162-165. Its principal purpose appears to be to vest in the Commission control over competition in the sale of natural gas to industries through the requirement of a certificate of public convenience and necessity before any sale can lawfully be made. However, Ind. Acts. 1913, c. 76, sec. 99, p. 167 (Burns' Ind. Stat. Ann., 1933, Sec. 54-603) prohibits the granting, except to an Indiana corporation or citizen, of any license, permit or franchise to own, operate, manage or control any plant or equipment of any public utility.

Other provisions of the Act authorize the Commission to value all the property of every public utility (Sec. 54-203;[1] Ind. Acts 1933, c. 190, sec. 4, p. 933); to require that a public utility shall keep all books, accounts, papers and records within the state and to prohibit their removal from the state without permission of the Commission (Sec. 54-212; Ind. Acts, 1915, c. 110, sec. 1, p. 457); to inspect and examine any and all books, accounts, papers, records and memoranda kept by such public utility (Sec. 54-215; Ind. Acts, 1913 c. 76, sec. 21, p. 175); to ascertain and determine the proper and adequate rates of depreciation of the several classes of property of each public utility (Sec. 54-216; Ind. Acts 1925, c. 64, sec. 1, p. 210); to supervise and regulate arrangements between a public utility and its customers or consumers or with its employees, such arrangements being unlawful unless approved by the Commission (Sec. 54-221; Ind. Acts 1913, c. 76, sec. 27, p. 177); and to fix rates, charges and regulations governing terms of service (Secs. 54-222 and 54-223; Ind. Acts 1913, c. 76, sec. 28, p. 177). The Act also provides that every public utility shall file its schedules of rates and terms of service with the Commission (Sec. 54-313; Ind. Acts 1913, c. 76, sec. 41, p. 180) and that no changes

[1] Here, and in each subsequent citation in this paragraph, the first source given refers to the particular section of Burns' Ind. Stat. Ann. 1933, wherein the provision is codified.

in schedules of rates and charges shall be made without approval of the Commission (Sec. 54-317; Ind. Acts 1913, c. 76, sec. 45, p. 181); confers upon the Commission extensive authority over management of the business and compensation of officers and employees of a public utility (Sec. 54-402; Ind. Acts 1927, c. 146, sec. 1, p. 445); confers upon the Commission extensive authority over the holders of the voting capital stock of all public utility companies under its jurisdiction, affiliated interests and contracts with affiliates (Sec. 54-402; Ind. Acts 1933, c. 190, sec. 6, p. 935); and confers upon the Commission extensive authority over the issuance and sale of bonds, notes or other evidences of indebtedness by a public utility and the application of the proceeds from the same (Secs. 54-504 and 54-505; Ind. Acts 1933, c. 190, sec. 8, p. 941; Ind. Acts 1913, c. 76, sec. 92, p. 196).

## III. Date of Judgment and Date on Which Application for Appeal Was Presented and Allowed

The date of the final decision and judgment sought to be reviewed is February 5, 1947.

The original decision and judgment of the Supreme Court of Indiana, which ordered entry of judgment by the trial court denying relief to appellee-appellant, was rendered on February 5, 1947.

Appellee-appellant thereafter timely filed a petition for rehearing, which petition was denied by the Supreme Court of Indiana on March 25th, 1947, making such date that of final judgment. *Citizens Bank of Michigan City, Indiana* v. *Opperman*, 249 U.S. 448, 449. Under the Constitution of Indiana, the Supreme Court of Indiana is the court of last resort in the state. (Constitution of the State of Indiana, Article VII, Section 1.)

The petition for appeal to the Supreme Court of the United States was filed and allowed on March 25th, 1947.

## IV. Manner in Which Federal Question Was Raised

The Federal Question was raised at the outset and urged throughout all the proceedings in the State Court. In response to the statutory notice given by the Public Service Commission of Indiana, setting for hearing the proceeding commenced by it on October 13, 1944, appellee-appellant filed written objections to said proceeding and the exercise by said Commission of any jurisdiction therein, specifying that "any action or order of the Public Service Commission of Indiana herein purporting to regulate, interfere with, or otherwise affect the sale and delivery by Panhandle Eastern Pipe Line Company to Anchor-Hocking Glass Company of natural gas transported in interstate commerce would unlawfully burden interstate commerce in violation of Article I, Section 8(3) of the Constitution of the United States and that if Sections 54-112 *et seq.*, Burns' Indiana Statutes Annotated, 1933, or any other statute, is construed to purport to authorize said Commission to regulate, interfere with or otherwise affect such sale and delivery such statutes as so construed are unconstitutional and void because of violation of Article I, Section 8(3) of the Constitution of the United States." (R. 194A, 194B, p. 8 of Commission Order, Appendix "C", Post p. 70)

The complaint filed by appellee-appellant in the Randolph Circuit Court alleged that the order of the Public Service Commission sought to be vacated and set aside unlawfully regulates and burdens interstate commerce in violation of Article I, Section 8(3) of the Constitution of the United States, and that any statute of the State of Indiana construed to authorize such order, if applied to the business of appellant, unlawfully regulates and burdens interstate commerce in violation of Article I, Section 8(3) of the Constitution of the United States. (R. 29, 30.)

Moreover, the Supreme Court of the United States has jurisdiction on appeal where "it appears from the opinion of the state court of last resort that a state statute was drawn in question, as repugnant to the Constitution, and that the decision of the court was in favor of its validity". (*Charleston Federal Savings and Loan Association, et al.* v. *Alderson*, 324 U.S. 182, 185). The opinion of the Supreme Court of Indiana, appended to this statement, affirmatively shows that the Federal Question was presented to, considered and decided by it. In its opinion, the Supreme Court of Indiana said in part:

> "In this case we have to do with the right of the State of Indiana to regulate service and fix rates upon deliveries of natural gas from an interstate pipe line direct to large industrial consumers within the State." (Appendix "A", post p. 24)
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> . . . . . .
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> "In the original order, the Commission concluded and said "that the distribution in Indiana of natural gas direct to consumers is subject to regulation by this Commission under the laws of this state.' It was contended by appellee that the Commission's order constituted an assumption of jurisdiction to regulate appellee's rates and service direct to consumers in Indiana, and that such regulation could not be accomplished without violation of the Commerce Clause of the Federal Constitution. Accordingly appellee filed a statutory action to secure a judicial review of said order and to have said order set aside and its enforcement enjoined." (Appendix "A", post p. 26)
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> "We hold that the orders of the Commission, in this case, constitute an unequivocal assertion of power and jurisdiction to regulate and fix rates upon sales of nat-

ural gas from appellee's interstate pipe line direct to large industrial consumers of gas in Indiana, and that they were sufficient to present to the trial court and to this court the question of the jurisdiction and power of appellant Commission to fix rates for such sales and service and to make regulations with reference to same.

"The trial court reached the conclusion that the delivery of natural gas by appellee direct to industrial consumers connected with its lines constituted interstate commerce and that the orders of the Public Service Commission of Indiana under attack violated the commerce clause of the Federal Constitution, and it vacated and set aside the orders of the Public Service Commission of Indiana complained of and enjoined the Commission and the members thereof from enforcing said orders or any paragraph thereof." (Appendix "A", post pp. 27-28)

* * * * * * *

"Appellee contends that under the rule just stated where gas flows continuously without interruption from out-state gas fields direct to in-state consumers, the deliveries to in-state consumers constitute interstate commerce. We recognize that this is a sound conclusion, but it is contended by appellants that there is interruption in the flow of gas to Anchor-Hocking and that the sales and deliveries to Anchor-Hocking are, and that in the future sales to other large industrial consumers will be, intrastate in nature. This is predicated largely upon the fact that gas is diverted at low pressures from the main line high-pressure supply into lateral and branch lines in such manner that the diverted gas cannot be restored to the high pressure main line flow." (Appendix, "A", post pp. 28-29)

* * * * * * *

"However, it is now well established that sales and deliveries from interstate pipe lines to local utilities for resale are interstate transactions. *Natural Gas Act*, 15 USCA, § 717 (b); *Missouri ex rel. Barrett v.*

*Kansas Natural Gas Co., supra; Public Utilities Commission v. Landon, supra; State Corporation Commission v. Wichita Gas Co.* (1934), 290 U. S. 561, 563, 78 L. ed. 500, 502. Such sales and deliveries are, so far as segregation and reduced pressures are concerned, almost exactly like sales direct to large industrial consumers. For example, gas for Anchor-Hocking and gas for the Indiana-Ohio Company, the distributing utility serving the City of Winchester, and other towns thereabout, leave the main line through the same lateral and at identical pressures. In fact they are inseparably a part of the same flow. This common flow continues until the lateral divides close to points of delivery to Anchor-Hocking and the Indiana-Ohio Company. As has already been shown, the pressures there, while not exactly the same to each, are substantially the same. If the segregation and reduced pressure for delivery to the Indiana-Ohio Company do not make such transactions intrastate commerce under the 'broken package' theory, we cannot vary consistently apply the 'broken package' theory to almost identical deliveries to Anchor-Hocking. (Appendix "A", post pp. 29-30)

. . . . . .

"Under the language and holdings of the cases above cited and quoted, the circumstances of the case before us seem to permit state regulation of sales direct from interstate pipe lines to Indiana consumers." (Appendix "A", post pp. 32-33)

. . . . . .

"The State of Indiana, in its scheme of utility regulation, controls sales to all other consumers of gas brought into Indiana through interstate pipe lines. The sales by local distribution utilities are regulated by the state. The record shows that many industrial consumers are thus provided with natural gas derived from exactly the same source. If sales to some are regulated by the State and others are free from regulation confusion is natural.

"Also if Indiana may not regulate the sale of natural gas from interstate pipe lines direct to large industrial consumers in Indiana, such sales and deliveries will not be regulated at all under present law. The result will not only be that the pipe line owners, free of regulations, will have advantage over regulated local utilities in competing for business from large industrial commerce, but the customers of the pipe lines may be given advantage over the customers of the local utilities. Local utilities whose costs per unit of gas have been increased by the reduced volume of sales caused by the direct deliveries from the pipe lines will be entitled to higher rates and resulting price disparity unfavorable to customers of the local utilities will tend to break down the state system of regulation which will have fixed, and appear to be responsible for, the unfavorable local rates. This probable result, it seems to us, is a weighty consideration in balancing national interest against local need." (Appendix "A", post pp. 36-37)

* * * * * * *

"In the case before us the sales are and will be to local customers for their own consumption. Therefore, paraphrasing the language quoted, the local interest is paramount and interference with interstate commerce, if any, is of minor importance and permissible." (Appendix "A", post p. 38)

* * * * * * *

"We also have an Indiana statute which defines a public utility, subject to control of the Indiana Public Service Commission, to be '* * * every corporation * * *, that now or hereafter may own, operate or control any * * * plant or equipment * * * for the * * * transmission, delivery or furnishing of heat, light, water or power * * * either directly or indirectly to or for the public * * *' § 54-105 Burns' 1933.

"Another Indiana Statute became law on February 26, 1945, before the orders involved in this action were made by the Indiana Public Service Commission. Acts of 1945, Chap. 53, p. 110. This act adds an additional section to the Indiana Public Service Commission Act aimed directly at the natural gas business, and by the act a 'gas utility' was defined to mean and include 'any public utility selling or proposing to sell or furnish gas directly to any consumer or consumers within the State of Indiana for his, its or their domestic, commercial or industrial use.' Certainly appellee is selling and proposing to sell gas directly to consumers in Indiana.

"The bottom question on this phase of the case is whether the appellee is furnishing gas in Indiana directly or indirectly to or for the public. Admittedly it is selling gas in Indiana indirectly to and for the public through distributing companies and that makes it a public utility under the Indiana statute, subject to regulation and control by the Indiana Public Service Commission. Also admittedly it is selling and proposing to sell gas directly to consumers within the state. This part of its business and its interstate transportation and its sales to local distributing utilities are so integrated that in any practical consideration of the state's right to regulate direct sales to consumers that activity must be appraised as a part of its entire business in Indiana. Its rights and duties, with reference to such direct sales, must be determined in the light of its over-all character in the State of Indiana. It will compete with local activities in soliciting industrial business and will be in position to discriminate in its service and in its rates and in its regulations. This freedom is inconsistent with all concepts of the duties and obligations of a person or corporation engaged in such business.

"The primary duty of a public utility is to serve on reasonable terms all those who desire the service it renders. This duty does not permit it to pick and

choose and to serve only those portions of the territory which it finds most profitable, leaving the remainder to get along without the service which it alone is in a position to give." (Appendix "A", post pp. 40-41)

## V. Opinions.

The opinion of the Public Service Commission of Indiana was incorporated with its order issued November 21, 1945, and is set forth in full as Appendix "C" hereto, post pp. 61-148. Upon appellee-appellant's application to the Randolph Circuit Court for a judicial review of the Commission's order and to have said order set aside and its enforcement enjoined, Judge Macy, presiding in that court, rendered an opinion sustaining appellee-appellant's contention that the order, together with the order supplemental thereto issued April 9, 1946, and the underlying statutes upon which said order as supplemented was based, as applied to its business, were repugnant to Article I, Section 8, Clause 3, of the Constitution of the United States and entered a judgment granting the relief prayed by appellee-appellant. Judge Macy's opinion is set forth in full as Appendix "B" hereto, post pp. 43-60. The opinion of the Supreme Court of Indiana, reversing the judgment of the Randolph Circuit Court and sustaining the order of the Commission and the underlying statutes involved, as applied to appellee-appellant's business, is set forth in full as Appendix "A" hereto, post pp. 24-42. It is not yet reported.

## VI. The Federal Questions Involved Are Substantial

The questions involved are substantial and of great importance not only to appellee-appellant but also to the public. If the State of Indiana, through its Public Service Commission, can regulate (with the power to prohibit through denial of certificates of convenience and necessity) rates and service with respect to the interstate sale and

delivery of natural gas by appellee-appellant direct to large industrial consumers in the State of Indiana, the same regulatory power may be exerted by the seven other states traversed by appellee-appellant's interstate pipe line, namely, Texas, Oklahoma, Kansas, Missouri, Illinois, Indiana, Ohio and Michigan.[2] Whereas, at the commencement of the proceedings below, appellee-appellant had only one direct sale in the State of Indiana (namely, to Anchor-Hocking Glass Company at Winchester, Indiana), and at the conclusion of the proceedings only two (the second being to E. I. DuPont de Nemours at Fortville, Indiana), its substantial volume of direct sales from its interstate pipe line to industrial customers over its entire system (the treatment of the revenue from which by the Federal Power Commission was an issue in *Panhandle Eastern Pipe Line Company* v. *Federal Power Commission, et al.*, 324 U. S. 635) would be subjected to state regulation in the respective states where such interstate sales and deliveries are made. Furthermore, such regulatory power may be exerted by the several states over the direct interstate sales of other natural gas pipe line companies. The primary question presented, therefore, is of grave importance not only to the natural gas industry, whose increasing national importance may be regarded as judicially known, but also to the numerous state regulatory commissions in the states traversed by interstate natural gas pipe lines.

In deciding the primary question adversely to the appellee-appellant, the Supreme Court of Indiana departed in a

[2] Although it does not appear in the record, being mentioned only in the briefs and argument, all parties to this cause know that there is now pending before the Supreme Court of Michigan an appeal from a decision (not yet reported) rendered October 5, 1946, by the Circuit Court for the County of Ingham, Michigan, setting aside and enjoining as an unconstitutional burden on interstate commerce, an order of the Michigan Public Service Commission seeking to regulate appellee-appellant's direct sales from its interstate pipe line to large industries in Michigan.

number of respects from the course marked by decisions of the Supreme Court of the United States.

By holding that the state in which natural gas, which has been sold under individual contracts specifying the price therefore and transported from other states in interstate commerce, is delivered in wholesale quantities to large industrial consumers, may regulate the rates for said sales, the Supreme Court of Indiana has sanctioned the imposition of a direct burden on such commerce "which may fairly be deemed to have the effect of impeding the free flow of trade between states" and interferes with "the area of trade free from interference by the states" which is created by the Commerce Clause of its own force, *Freeman* v. *Hewit* (Dec. 16, 1946), 329 U. S. 249, 252; *Missouri ex rel. Barrett* v. *Kansas Natural Gas Co.* (1924), 265 U. S. 298; *Public Utilities Comm.* v. *Attleboro Steam & Electric Company* (1927), 273 U.S. 83, 71 L. Ed. 549. The power to regulate the price at which a commodity is sold in interstate commerce is a dominant power over the commerce in the same manner as the power to tax and is not a regulation of a local aspect of commerce. (Cf. *Freeman* v. *Hewit* (Dec. 16, 1946), 329 U. S. 249.) The Supreme Court of Indiana has held that such sales are of paramount local, rather than national, interest and importance and that uniformity of regulation, if regulation is to be imposed, is unnecessary, and has predicated the right of state regulation on such conclusion, but the Supreme Court of the United States is, under the Commerce Clause, the final arbiter of the competing demands of state and national interest. *Southern Pac. Co.* v. *Arizona*, 325 U. S. 761, 769; *Morgan* v. *Virginia*, 328 U. S. 373, 380.

In determining that local interest outweighs national interest and justifies state regulation of interstate sales to industrial consumers, the Supreme Court of Indiana has

held that such regulation is necessary to protect local distributing companies from unregulated interstate pipe line company competition for industrial consumer business, to protect local consumers from higher rates which would be necessitated by a reduced volume of industrial consumer business for local distributing companies, and to protect industrial consumer customers of local distributing companies from disadvantages which would be suffered if customers of interstate pipe line companies were given more favorable rates. The consideration of local interest of this character as a basis for local regulation is at variance with principles stated by the Supreme Court of the United States in the following decisions: *Public Utilities Comm.* v. *Attleboro Steam & Electric Co.* (1927), 273 U. S. 83; *Baldwin* v. *Seelig* (1935), 294 U. S. 511; *Buck* v. *Kuykendall* (1925), 267 U. S. 307; *Busch & Sons Co.* v. *Maloy* (1925), 267 U. S. 317.

The Supreme Court of Indiana, in failing to hold applicable *Missouri ex rel Barrett* v. *Kansas Natural Gas Co.* (1924), 265 U. S. 298, and *Public Utilities Commission* v. *Attleboro Steam and Electric Co.* (1927), 273 U. S. 83, 71 L. Ed. 549, and determining that *Pennsylvania Gas Co.* v. *Public Service Commission*, 252 U. S. 23, was controlling, conceded that sales and deliveries from interstate pipe lines to local utilities are, "so far as segregation and reduced pressures are concerned, almost exactly like sales direct to large industrial consumers," but stated that the decisions of the Supreme Court of the United States seemed to it "to indicate that the test is whether or not local business is involved and that supplying local consumers is a local business." But the Supreme Court of the United States has never held that the determination of whether local or national interest is paramount depends solely on whether the sale of commodities transported in interstate commerce is for resale or consumption. The conclusion reached by the

Supreme Court of Indiana that the use to which the buyer intends to put the commodity purchased is the controlling test conflicts with statements made by the Supreme Court of the United States in *Schollenberger*, v. *Pennsylvania* (1898), 171 U. S. 1, 24, and *Hooven & Allison Co.* v. *Evatt* (1945), 324 U. S. 652, 667. In the decisions of the Supreme Court of the United States relied on by the Supreme Court of Indiana, local interest was obviously predicated on local activities of the seller rather than the intended use of the buyer. *Missouri ex rel. Barrett* v. *Kansas Natural Gas. Co.* (1924), 265 U. S. 298, 309. The Supreme Court of the United States has held that "the business of supplying, on demand, local consumers, is a local business," even though the gas be brought from another state, and drawn for distributing directly from interstate mains," and "whether the local distribution be made by the transporting company or by independent distributing companies" (263 U. S. 298, 309), but this principle has no application to direct deliveries under individual contracts in wholesale quantities. (Cf. *Walling* v. *Jacksonville Paper Co.* (1943), 317 U. S. 564; *Roland Electric Co.* v. *Walling* (1946), 326 U. S. 657, 90 L. Ed. (adv. op.) 362.)

Under the opinion of the Supreme Court of Indiana the door is opened for state regulation of the price at which other commodities found to be "affected with a public interest" may be sold in interstate commerce, provided only that the purchase is for consumption and not for resale. There can be no reason for the application of a different principle because the commodity is natural gas. *Pennsylvania* v. *West Virginia* (1922), 262 U. S. 553, 596. Other commodities have been held subject to state and federal price regulation. *U. S.* v. *Rock Royal Cooperative* (1938), 307 U. S. 553, 570, 571.

The Supreme Court of Indiana has asserted as a reason for subjecting interstate sales to industrial consumers to state regulation that otherwise such sales would be unregulated, but the Supreme Court of the United States has denied such a principle as a basis for state regulation of a selling price for natural gas sold and delivered in interstate commerce. *Missouri ex rel. Barrett* v. *Kansas Natural Gas Company* (1924), 265 U. S. 298, 308; *Public Utilities Commission* v. *Attleboro Steam and Electric Company* (1927), 273 U. S. 83, 90.

The Indiana court also inferred from the failure of Congress to include regulation of rates for interstate sales to industrial consumers in enacting the Natural Gas Act that Congress determined such sales to be of paramount local interest and therefore property subject to state regulation. Aside from the lack of any conclusive evidence as to the intention or belief of Congress with reference to such sales, the Supreme Court of the United States has not heretofore held that Congress may redefine the distribution of power over interstate commerce (cf. *Southern Pac. Co.* v. *Arizona*, 325 U. S. 761, 769; *Prudential Ins. Co.* v. *Benjamin* (1946), 328 U. S. 408) so as to remove the protection of the Commerce Clause by its mere failure to include a wholly interest phase of a business in a scheme of federal regulatory legislation.

The opinion of the Indiana court also states that since appellee-appellant is admittedly selling natural gas in Indiana directly to and for the public through distributing companies, it is a public utility as defined in Section 54-105, Burns' Indiana Statutes Annotated, 1933; Ind. Acts 1933, c. 190, sec. 1, p. 928, subject to regulation and control by the Indiana Public Service Commission, and that its sales to industrial consumers and its interstate transportation and sales to local distributing companies are so integrated that

its rights and duties with reference to such direct sales must be determined in the light of its overall character in Indiana. The assertion of jurisdiction to regulate and control with reference to sales to distributing companies, by reason of the Indiana statutory definition of a public utility, conflicts not only with *Missouri ex rel. Barrett* v. *Kansas Natural Gas Co.* (1924), 265 U. S. 298; *Peoples Natural Gas Co.* v. *Public Service Commission* (1926), 270 U. S. 550; and *State Corp. Comm.* v. *Wichita Gas Co.* (1934), 290 U. S. 561, 563, but also with *Illinois Natural Gas Co.* v. *Central Illinois Public Service Company* (1941), 314 U. S. 498, and *Public Utilities Commission* v. *United Fuel Gas Co.* (1943), 317 U. S. 456.

The Indiana court, in its opinion (Appendix "A" p. 37) states that "the exact question now before this court has never been decided by the Supreme Court of the United States." While appellee-appellant agrees with this statement (cf. *Arkansas-Louisiana Gas Co.* v. *Department of Public Utilities, et al.*, 304 U. S. 601), it insists that the judgment from which this appeal is taken is clearly contrary to settled principles of law established by the foregoing decisions of the Supreme Court of the United States and should, in the public interest, be reviewed and reversed.

An authoritative decision of the Supreme Court of the United States settling the question will be of great benefit to the natural gas industry and to the numerous state regulatory bodies concerned and will prevent diversity of rulings by courts of last resort in the states where interstate pipe line companies make interstate sales of natural gas directly to large industrial customers. In this connection, we mention *State, ex rel. Cities Service Co.* v. *Public Service Commission* (1935), 85 S. W. (2d) 1890, cert. den. (1936) 296 U. S. 657, wherein the Supreme Court of Missouri held

that interstate sales of natural gas by the pipe line company direct to industrial consumers could not be subjected to state regulation.

Respectfully submitted,

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## APPENDIX "A"

APPENDIX TO JURISDICTIONAL STATEMENT
OPINION OF INDIANA SUPREME COURT

IN THE SUPREME COURT OF INDIANA

No. 28225

February 5, 1947. 63rd Judicial Day. November Term 1946.

THE PUBLIC SERVICE COMMISSION OF INDIANA, et al.

vs.

PANHANDLE EASTERN PIPE LINE COMPANY.

Appeal from Randolph Circuit Court.

YOUNG, J.;

In this case we have to do with the right of the State of Indiana to regulate service and fix rates upon deliveries of natural gas from an interstate pipe line direct to large industrial consumers within the State.

Appellee owns a large pipe line, through which it transports natural gas from Texas and Kansas into and across intervening states, including Indiana, to Ohio and Michigan. At different points along this line, gas is diverted into branch or lateral lines, smaller in size and at lower pressure, to be delivered to distribution systems owned and operated by various municipalities and public utility corporations and directly to selected, large industrial consumers of gas within practical distance of its through line.

When these proceedings started appellee furnished gas in Indiana to 10 utilities, including the corporate appellants, and four municipalities who, in turn, distributed such gas to 112,000 residential, industrial and commercial consumers in Indiana. One of these laterals takes off from the main line near Winchester, Indiana, and at the end of this lateral there are two branches, one leading to a meter house, through which deliveries are made to Indiana-Ohio Public Service Company, which owns a distribution system serving Winchester and nearby territory. The other branch leads to another meter house, through which gas is delivered direct

to the Anchor-Hocking Glass Corporation for its own consumption. Service to Anchor-Hocking is, and service to other large industrial consumers will be, under special, privately negotiated contracts, each upon terms agreed upon for its particular case.

Appellee's gas enters Indiana at a pressure of about 250 pounds per square inch in 22 inch mains. After reaching Indiana the pressure is reduced to approximately 200 pounds per square inch in 16 inch mains. When the Winchester lateral leaves the main line, pressure is reduced to 80 or 100 pounds per square inch and there is no provision whereby it may ever be returned to the main line. Thereby it is segregated from the gas flowing interstate in the main line but the continuity of flow from the source to the meter houses is not interrupted. At the meter houses referred to pressure is again reduced and some deliveries are made to Anchor-Hocking at 40 pounds per square inch and some at 10 pounds per square inch. Deliveries are made to the Indiana-Ohio Public Service Company at 9 to 25 pounds per square inch. In both cases all facilities up to the pipe on the outlet side of the meter houses are owned and operated by appellee. The Winchester lateral is located in part on public highways in Randolph County pursuant to authority granted by the Board of Commissioners of that county to a predecessor of appellee which built the line. For what significance it may have, we know judicially that appellee's main line and other laterals could not cross the state and branch out into the areas served without at least crossing highways and probably otherwise using same pursuant to arrangement with local governmental units.

The quantity sold to Anchor-Hocking is many times the quantity sold to the Indiana-Ohio Company. Anchor-Hocking was the only industrial consumer in Indiana served direct by the appellee at the time of the commencement of these proceedings. Subsequently, however, service direct to a DuPont plant, near Fortville, Indiana, was undertaken under contract and appellee had adopted a policy of furnishing gas direct to selected large industrial consumers in Indiana, as it is doing in other states. Before appellee began serving Anchor-Hocking, Anchor-Hocking had been buying

its gas from a local distributing utility which, in turn, had purchased it from appellee or its predecessor.

It appears that in like manner, as appellee begins service direct to other large industrial consumers, it will, in most, if not all, instances supplant service by local public utility companies. These local distribution utilities have expressed alarm that taking away their large customers, thereby decimating the volume of their sales, will cripple their ability to serve domestic and small commercial and industrial consumers at fair rates.

In this situation, the Public Service Commission of Indiana instituted an investigation of the affairs of the appellee so far as same relate to sales of gas under contract direct to Anchor-Hocking Glass Corporation or any other industrial consumer or consumers of natural gas within the State of Indiana. (§54-112 Burns' 1933.) The corporate appellants intervened. This investigation resulted in an order on November 21, 1945, by the Public Service Commission of Indiana, requiring appellee to file with the Commission its tariffs covering rates, rules and regulations pertaining to any and all sales of natural gas by appellee direct to ultimate consumers within the State of Indiana, and to file annual reports on forms prescribed by the Commission, so long as it continues to distribute gas direct to any consumer in Indiana, and to file certain other relevant reports and data. In the original order, the Commission concluded and said "that the distribution in Indiana of natural gas direct to consumers is subject to regulation by this Commission under the laws of this state." It was contended by appellee that the Commission's order constituted an assumption of jurisdiction to regulate appellee's rates and service direct to consumers in Indiana, and that such regulation could not be accomplished without violation of the Commerce Clause of the Federal Constitution. Accordingly appellee filed a statutory action to secure a judicial review of said order and to have said order set aside and its enforcement enjoined.

In the course of the hearing in the trial court, the appellant Commission contended that the action was premature because the order complained of merely required in-

formation which it was entitled to have, regardless of its power, or lack of power, to fix rates or otherwise regulate sales of gas by appellee directly to large industries for use by them in Indiana, and that no action will lie to test such power until the Commission attempts to exercise same. Acting upon this contention of counsel for the appellant Commission, appellee offered, in writing, to file with the Commission "all papers and documents specified in the order dated November 21, 1945, provided the Commission desires the same for information purposes only and not as an assertion of the regulatory jurisdiction of respondent's business, and *provided* said order is so modified or such further order is entered by the Commission as to preclude the possibility of any contention hereafter that Respondent will be in any manner prejudiced in its right to contest the jurisdiction of the Commission to regulate its said business in the event the Commission shall hereafter assert the right, power, authority or jurisdiction to regulate the same."

The Commission declined to accept appellee's filing of the required papers upon the conditions named in the appellee's offer and, in doing so, the appellant Commission made a supplemental order in which it asserted categorically that the tariffs, rates, rules and regulations, the annual reports and the accounting information, required by the original order when filed, shall be deemed to be on file and be available, among other things, for use by the Commission "in connection with the regulation of rates and service appertaining to the supplying of natural gas by Panhandle direct to consumers within the State of Indiana." Notwithstanding the language of the original and supplemental orders, the Commission continues to take the position that its power to regulate appellee's sales and deliveries of gas direct to large consumers in Indiana is not involved in this proceeding. With this contention we cannot agree.

On authority of *Public Utilities Commission* v. *United Fuel Gas Co.* (1943), 317 U. S. 456, 459, 465, 468, 87 L. Ed. 396, 398, 401, 403, we hold that the orders of the Commission, in this case, constitute an unequivocal assertion of power and jurisdiction to regulate and fix rates upon sales of natural gas from appellee's interstate pipe line direct to

large industrial consumers of gas in Indiana, and that they were sufficient to present to the trial court and to this court the question of the jurisdiction and power of appellant Commission to fix rates for such sales and service and to make regulations with reference to same.

The trial court reached the conclusion that the delivery of natural gas by appellee direct to industrial consumers connected with its lines constituted interstate commerce and that the orders of the Public Service Commission of Indiana under attack violated the commerce clause of the Federal Constitution, and it vacated and set aside the orders of the Public Service Commission of Indiana complained of and enjoined the Commission and the members thereof from enforcing said orders or any paragraph thereof. The Public Service Commission of Indiana, and the individual members thereof, filed a motion for a new trial and same was overruled. Likewise the corporate appellants filed motions for a new trial, which were overruled and appeals were taken to this court.

In determining whether or not the Indiana Commission has jurisdiction to regulate and fix rates for deliveries of gas by appellee, direct to large industrial consumers in Indiana, we should first consider whether such deliveries constitute intrastate commerce. If they do then the state may regulate and what the Indiana Commission has done does not violate the commerce clause of the Federal Constitution. But if they constitute interstate commerce that does not necessarily mean the state may not, under any circumstances, intervene.

Natural gas is a commodity which may be transported as an article of commerce. Its transmission from one state to another constitutes interstate commerce. *State ex rel. Corwin* v. *The Indiana and Ohio Oil, Gas, and Mining Co.* (1889), 120 Ind. 575, 577, 579, 22 N. E. 778; *Pennsylvania* v. *West Virginia* (1923), 262 U. S. 553, 596, 67 L. Ed. 1117, 1132; *Missouri ex rel. Barrett* v. *Kansas Natural Gas Co.* (1924), 265 U. S. 298, 307, 68 L. Ed. 1027; *Public Utilities Commission* v. *Landon* (1919), 249 U. S. 236, 245, 63 L. Ed. 577.

Appellee contends that under the rule just stated where gas flows continuously without interruption from out-state

gas fields direct to in-state consumers, the deliveries to in-state consumers constitute interstate commerce. We recognize that this is a sound conclusion, but it is contended by appellants that there is interruption in the flow of gas to Anchor-Hocking and that the sales and deliveries to Anchor-Hocking are, and that in the future sales to other large industrial consumers will be, intrastate in nature. This is predicated largely upon the fact that gas is diverted at low pressures from the main line high-pressure supply into lateral and branch lines in such manner that the diverted gas cannot be restored to the high pressure main line flow. They say that the continuity of movement is broken; that the gas is segregated for a particular intrastate use or uses and they apply to the "broken package" rule to make such sales to Anchor-Hocking intrastate in character. There are cases which apply the "broken package" doctrine to situations not entirely dissimilar and which lend support to appellants' contention. *East Ohio Gas Co.* v. *Tax Commission* (1931), 283 U. S. 465, 75 L. Ed. 1171, 1175; *Southern National Gas Corp.* v. *Alabama* (1937), 301 U. S. 148, 81 L. Ed. 970, 974-5; *Mississippi River Fuel Corp.* v. *Smith* (Mo. 1942), 164 S. W. (2d) 370, 375.

However, it is now well established that sales and deliveries from interstate pipe lines to local utilities for resale are interstate transactions. *Natural Gas Act*, 15 USCA, § 717 (b); *Missouri ex rel. Barrett* v. *Kansas Natural Gas Co.*, *supra*; *Public Utilities Commission* v. *Landon*, *supra*; *State Corporation Commission* v. *Wichita Gas Co.* (1934), 290 U. S. 561, 563, 78 L. Ed. 500, 502. Such sales and deliveries are, so far as segregation and reduced pressures are concerned, almost exactly like sales direct to large industrial consumers. For example, gas for Anchor-Hocking and gas for the Indiana-Ohio Company, the distributing utility serving the City of Winchester, and other towns thereabout, leave the main line through the same lateral and at identical pressures. In fact they are inseparably a part of the same flow. This common flow continues until the lateral divides close to points of delivery to Anchor-Hocking and the Indiana-Ohio Company. As has already been shown, the pressures there, while not exactly the same to each, are substantially the same. If the segrega-

tion and reduced pressure for delivery to the Indiana-Ohio Company do not make such transactions intrastate commerce under the "broken package" theory, we cannot very consistently apply the "broken package" theory to almost identical deliveries to Anchor-Hocking.

But we need not decide whether the Anchor-Hocking business and prospective sales direct to other large industrial consumers are interstate or intrastate by mechanical standards. Even if they are interstate they still may be subject to state regulation under some circumstances. It has long been established that the power of Congress over interstate commerce is not exclusive. If the Federal Government has not elected to exercise its power under the commerce clause, and if the transaction is not of such nature as to require uniform regulation on a national basis, and if it is so local in its nature and implications that local needs outweigh national interest then, even though interstate, according to mechanical tests, the state may intervene and regulate. *Minnesota Rate Cases* (1913), 230 U. S. 352, 399, 402, 57 L. Ed. 1511, 1541, 1542; *South Carolina State Highway Dept.* v. *Barnwell Bros.* (1938), 303 U. S. 177, 185, 82 L. Ed. 734; *Parker* v. *Brown* (1943), 317 U. S. 341, 359-363, 87 L. Ed. 315; *Cloverleaf Butter Co.* v. *Patterson* (1942), 315 U. S. 148, 155, 86 L. Ed. 754; *Southern Pacific Co.* v. *State of Arizona* (1945), 325 U. S. 761, 766, 89 L. Ed. 1915; *Kelly* v. *Washington* (1937), 302 U. S. 1, 10, 82 L. Ed. 3.

In the *Minnesota Rate Cases, supra*, the question of the conflicting claims of the State and the Federal Government, with reference to interstate commerce regulations, arose. Mr. Justice Hughes, in commenting upon this conflict, said, on p. 399:

> ". . . It has repeatedly been declared by this court that as to those subjects which require a general system or uniformity of regulation, the power of Congress is exclusive. In other matters, admitting of diversity of treatment according to the special requirements of local conditions, the states may act within their respective jurisdictions until Congress sees fit to act; and, when Congress does act, the exercise of its authority

overrides all conflicting state legislation." (Citing many authorities.)

Following this language, the opinion states several things affecting interstate commerce (not involved in the case before us) which the states have no right to do and then on page 402 the court used the following language:

"'But within these limitations there necessarily remains to the states until Congress acts, a wide range for the permissible exercise of power appropriate to their territorial jurisdiction although interstate commerce may be affected. It extends to those matters of a local nature as to which it is impossible to derive from the constitutional grant an intention that they should go uncontrolled pending Federal intervention. Thus, there are certain subjects having the most obvious and direct relation to interstate commerce, which nevertheless, with the acquiescence of Congress, have been controlled by state legislation from the foundation of the government because of the necessity that they should not remain unregulated, and that their regulation should be adapted to varying local exigencies; hence, the absence of regulation by Congress in such matters has not imported that there should be no restriction, but rather that the states should continue to supply the needed rules until Congress should decide to supersede them. . . . Where the subject is peculiarly one of local concern, and from its nature belongs to the class with which the state appropriately deals in making reasonable provision for local needs, it cannot be regarded as left to the unrestrained will of individuals because Congress has not acted, although it may have such a relation to interstate commerce as to be within the reach of the Federal Power. . . ."

In *Cloverleaf Butter Co.* v. *Patterson, supra*, the right of the state to act with reference to interstate commerce is stated in the following words, beginning near the bottom of page 155 of 315 U. S.:

". . . It has long been recognized that in those fields of commerce where national uniformity is not essential,

> either the state or federal government may act. Willson *v.* Black Bird Creek Marsh Co. 2 Pet (US) 245, 7 L. Ed. 412; California *v.* Thompson, 313 US 109, 114, 85 L. Ed. 1219, 1221, 61 S. Ct. 930. Where this power to legislate exists, it often happens that there is only a partial exercise of that power by the federal government. In such cases the state may legislate freely upon those phases of the commerce which are left unregulated by the nation. But where the United States exercises its power of legislation so as to conflict with a regulation of the state, either specifically or by implication, the state legislation becomes inoperative and the federal legislation exclusive in its application."

These cases, and the language which we have quoted from them, establish that a state may interfere with interstate commerce under some circumstances and indicate those circumstances to be much as we have set them forth above.

The cases cited show a substantial abandonment of the mechanical test of when and where interstate commerce ends and intrastate commerce begins and test the right of states to regulate and tax local phases of interstate commerce by recognizing conflicting state and federal interests and attempting to compose and accommodate and adjust the competing demands that are inherent in our dual form of government. *United States v. South-Eastern Underwriters Association* (1944), 322 U. S. 533, 546, 547, 88 L. Ed. 1440. And the trend of the later cases is as stated in *Prudential* v. *Benjamin* (1946) 90 L. Ed. (Adv. Op.) 1023, 1030, 1031. In that case the broadening of the field of federal intervention in interstate commerce was discussed and then the following language was used at page 1030:

> ". . . the tendency also has run toward sustaining state regulatory and taxing measures formerly regarded as inconsonant with Congress' unexercised power over commerce, and to doing so by a new, or renewed, emphasis on facts and practical considerations rather than dogmatic logistic . . ."

Under the language and holdings of the cases above cited and quoted, the circumstances of the case before us seem

to permit state regulation of sales direct from interstate pipe lines to Indiana consumers. In reaching this conclusion we find the first prerequisite of state control, i. e. that the federal government has not undertaken to regulate such business. No regulation of interstate natural gas pipe lines and distribution by and through same was attempted by the federal government until Congress passed the Natural Gas Act in 1938. 15 U. S. C. A. § 717, et seq. By the Natural Gas Act, § 1 (b), Congress limited the application of the Act by the following language:

> "The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas *for resale* for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but *shall not apply to any other transportation or sale of natural gas or to the local* distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas." (Our italics.)

It will be seen that the only sales of natural gas subject to the statute are those for resale. Specifically it does not apply to any other sales, which definitely excludes from its operation direct sales to large industries for their own consumption. *Panhandle Eastern Pipe Line Co. v. Federal Power Commission* (1945), 324 U. S. 635, 646, 89 L. Ed. 1241; *Colorado Interstate Gas Co. v. Federal Power Commission* (1945), 324 U. S. 581, 588, 89 L. Ed. 1206.

The statute followed the decided cases. The Supreme Court had held that states could not regulate the sale of natural gas from interstate pipe lines to local utilities for resale and distribution through local distribution systems. *Missouri ex rel. Barrett v. Kansas Natural Gas Co., supra; State Corp. Commission v. Wichita Gas Co., supra.*

Likewise, it had been established that the states did have jurisdiction over sales by local distributing companies, even though the gas had come directly from interstate pipe lines. *Public Utilities Comm. v. Landon, supra; Pennsylvania Gas Co. v. Public Service Commission* (1919), 252 U. S. 23, 64 L. Ed. 434.

The statute, therefore, served to affirm and implement the rights of control, which the cases had already established. That this was the intent of Congress is shown by the legislative history of the statute. *Public Utilities Commission of Ohio v. United Fuel Gas Co., supra; Illinois Natural Gas Co. v. Central Illinois Public Service Co.* (1942), 314 U. S. 498, 506, 507, 86 L. Ed. 371; *Colorado Interstate Gas Co. v. Federal Power Commission* (1944), 324 U. S. 581, 600, 601, 89 L. Ed. 1206; *Federal Power Commission v. Hope Natural Gas Co.* (1943), 320 U. S. 591, 609, 610, 88 L. Ed. 333.

Referring to the legislative history of the act, and speaking of the scheme of the regulation intended by the Natural Gas Act, the Supreme Court said, in *Public Utilities Commission of Ohio v. United Fuel Gas Co., supra,* at page 467:

> "It is clear, as the legislative history of the Act amply demonstrates, that Congress meant to create a comprehensive scheme of regulation which would be complementary in its operation to that of the states, without any confusion of functions. The Federal Power Commission would exercise jurisdiction over matters in interstate and foreign commerce, *to the extent defined in the Act,* and local matters would be left to the state regulatory bodies. Congress contemplated a harmonious, dual system of regulation of the natural gas industry—federal and state regulatory bodies operating side by side, each active in its own sphere. See H. Rep. No. 2651, 74th Cong. 2d Sess. pp. 1-3; H. Rep. No. 709, 75th Cong. 1st Sess. pp. 1-4; Sen. Rep. No. 1162, 75th Cong. 1st Sess." (Our italics.)

Inferentially this means that those transactions over which jurisdiction was not given to the Federal Power Commission may be considered as local matters and left to state regulatory bodies. And again we remember that among transactions not included in the act are direct sales to large industrial consumers.

Report No. 709, 75th Cong., 1st Sess., referred to in the quotation from the United Fuel Gas Co. case, reads as follows:

". . . If enacted, the present bill would for the first time provide for the regulation of natural-gas companies transporting and selling natural gas in interstate commerce. It confers jurisdiction upon the Federal Power Commission over the transportation of natural gas in interstate commerce, and the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use. The States have, of course, for many years regulated sales of natural gas to consumers in intrastate transactions. The States have also been *able to regulate sales to consumers even though such sales are in interstate commerce*, such sales being considered local in character and in the absence of Congressional prohibition subject to State regulation. (See *Pennsylvania Gas Co. v. Public Service Commission* (1920), 252 U. S. 23). *There is no intention in enacting the present legislation to disturb the States in their exercise of such jurisdiction.* However, in the case of sales for resale, or so-called wholesale sales, in interstate commerce (for example sales by producing companies to distributing companies) the legal situation is different. Such transactions have been considered to be not local in character and, even in the absence of Congressional action, not subject to State regulation. (See *Missouri v. Kansas Gas Co.* (1924), 265 U. S. 298, and *Public Service Commission v. Attleboro Steam & Electric Co.* (1927), 273 U. S. 83). The basic purpose of the present legislation is to occupy this field in which the Supreme Court has held that the States may not act . . ." (Our italics.)

This language of the report clearly indicates the intent of Congress. It clearly indicates that the only sales to be regulated under the provisions of the bill were sales to local distributing utilities for resale. Failure to include sales direct to large industrial consumers indicates the thought upon the part of Congress that uniformity is not required

in such sales and that they are so local in nature as properly to be left to state regulation.

We seem to have all the prerequisites to state intervention. Congress has not elected to exercise its power under the commerce clause. Uniformity in control of direct sales from interstate pipe lines to large industrial consumers does not seem to be necessary. There is nothing in the record to indicate that it is. Conditions will differ from area to area and the varying needs will be met by varying procedures. Furthermore, the fact that there has been no uniformity, so far as the record shows, up to this time, and the additional fact that Congress rather deliberately left regulation of such sales out of its regulatory scheme are also indicative that uniformity is not necessary, or at least that Congress did not believe it to be necessary after investigation and reports by the Federal Trade Commission and hearings upon the bill, in which we may assume that the pertinent facts, with reference to character of regulation needed, were developed. It would also seem that Congress did not believe the national interest in the regulation of such business outweighed local needs, and the logic of the situation seems to support such position. The State of Indiana, in its scheme of utility regulation, controls sales to all other consumers of gas brought into Indiana through interstate pipe lines. The sales by local distribution utilities are regulated by the state. The record shows that many industrial consumers are thus provided with natural gas derived from exactly the same source. If sales to some are regulated by the State and others are free from regulation confusion is natural.

Also if Indiana may not regulate the sale of natural gas from interstate pipe lines direct to large industrial consumers in Indiana, such sales and deliveries will not be regulated at all under present law. The result will not only be that the pipe line owners, free of regulation, will have advantage over regulated local utilities in competing for business from large industrial consumers, but the customers of the pipe line may be given advantage over the customers of the local utilities. Local utilities whose costs per unit of gas have been increased by the reduced volume

of sales caused by the direct deliveries from the pipe lines will be entitled to higher rates and resulting price disparity unfavorable to customers of the local utilities will tend to break down the state system of regulation which will have fixed, and appear to be responsible for, the unfavorable local rates. This probable result, it seems to us, is a weighty consideration in balancing national interest against local need.

While the exact question now before this court has never been decided by the Supreme Court of the United States, cases have been cited which seem to us to be persuasive. In the cases of *Public Utilities Co. v. Landon, supra, Pennsylvania Gas Co. v. Public Service Commission, supra, East Ohio Gas Co. v. Tax Commission, supra,* and *Missouri ex rel. Barrett v. Kansas Natural Gas Co., supra,* deliveries of natural gas to consumers were held to be so local in nature as to permit state regulation and control.

The Landon case, the Pennsylvania Gas Company case and the East Ohio Gas Company case all held that gas taken from interstate pipe lines and delivered to consumers was subject to state regulation. It is true that these cases all involve sales in municipalities but the fact remains that the gas was all interstate gas and flowed directly from the points where captured through interstate pipe lines and distribution systems to consumers. In the Landon case service to consumers was not directly from the pipe line. There was an intervening distributing company. But in the other two cases gas was supplied to consumers by the pipe line company using distribution systems owned by it directly from sources outside the state. In all three cases the business was held to be so local in nature as to permit state interference by taxation or regulation. The Supreme Court, in later cases, seems to us to have indicated that the resulting in the Pennsylvania Gas Co. case was predicated largely upon the fact that the sales involved were to consumers. *Illinois Natural Gas Co. v. Central Illinois Public Service Co.*, p. 505, *supra, Jersey Central Power & Light Co. v. Federal Power Commission* (1943), 319 U. S. 61, 80 L. Ed. 1258. In the Barrett case, which did not involve sales to consumers but to distributing companies for resale, the

Landon case and the Pennsylvania Gas Company case were discussed and it was said, on p. 309 of 265 U. S.:

> "In both cases the things done were local, and were after the business in its essentially national aspect had come to an end. The distinction which constitutes the basis of the present decision is clearly recognized in the Landon Case. The business of supplying, on demand, local consumers, is a local business, even though the gas be brought from another state, and drawn for distribution directly from interstate mains; and this is so whether the local distribution be made by the transporting company or by independent distributing companies. In such case the local interest is paramount, and the interference with interstate commerce, if any, indirect and of minor importance. . . ."

By this language the Supreme Court of the United States seems to us to indicate that the test is whether or not local business is involved and that supplying local consumers is a local business. It does not seem to be material whether the service is by the transporting company or by an independent distributing company. In the case before us the sales are and will be to local customers for their own consumption. Therefore, paraphrasing the language quoted, the local interest is paramount and interference with interstate commerce, if any, is of minor importance and permissible.

In the case of *Southern Natural Gas Corp. v. Alabama, supra,* the validity of a franchise tax on a pipe line company was involved. The pipe line company furnished natural gas to three distributing utilities and this business was, of course, interstate under the Natural Gas Act and the decisions we have already cited. It also distributed gas directly to one large industrial consumer. The gas to this consumer was delivered in continuous movement from outstate gas fields. The court held that the tax was valid and in doing so indicated that the sale of gas to the one industrial consumer was so local or intrastate in nature as to justify the tax, which could not be imposed if the pipe line company was engaged only in interstate commerce.

There are many other cases cited by the parties on this phase of the case which have been helpful in reaching our

conclusion. We have examined all of them, but discussion of more of them would only unnecessarily further prolong this opinion.

We may add in connection with our comment on the decided cases that we have had in mind that taxation by a state and the exercise of its police power are not always justified by the same facts. It very recently has been said by the Supreme Court of the United States (Freeman *v.* Hewit, decided December 16, 1946) that state taxation of local aspects of interstate commerce will be more carefully scrutinized and more consistently resisted than state regulation under the police power. After weighing the competing State and Federal interests interference with local phases of interstate commerce by regulation may be allowed when interference by taxation would not be. It is pointed out that there are always other sources from which revenue may be derived by taxation and that revenue serves as well no matter what its source, whereas, as said by the Court in the Freeman *v.* Hewit case, *supra*, ". . . A police regulation of local aspects of interstate commerce is a power often essential to a State in safeguarding vital local interests. At least until Congress chooses to enact a nation-wide rule, the power will not be denied to the State. *The Minnesota Rate Cases*, 230 U. S. 352, 402 et seq.; *S. C. Hwy. Dept. v. Barnwell Bros.*, 303 U. S. 177; Union Brokerage Co. *v.* Jensen, 322 U. S. 202, 209-12 . . ."

This leniency toward the police power as compared with the taxing power of the states inures to the benefit of appellants in the case before us, not only in considering the merits of the differences involved but in weighing the value of the decided cases as precedents.

Suggestion is made by appellee, but not very vigorously urged, that it is not a public utility in its service direct to large industrial consumers in Indiana, and is, therefore, not subject to regulation in connection with such service. By the Natural Gas Act (§1 (a)) it appears that the natural gas business had been investigated by the Federal Trade Commission and reports had been made to Congress, and upon the basis of such investigation and reports Congress declared that the business of transporting and selling natural gas for ultimate distribution to the public is af-

fected with a public interest, and it is traditionally accepted that any business affected with a public interest is subject to regulation and control.

We also have an Indiana statute which defines a public utility, subject to control of the Indiana Public Service Commission, to be ". . . every corporation . . ., that now or hereafter may own, operate or control any . . . plant or equipment . . . for the . . . transmission, delivery or furnishing of heat, light, water or power . . . either directly or indirectly to or for the public . . ." § 54-105 Burns' 1933.

Another Indiana Statute became law on February 26, 1945, before the orders involved in this action were made by the Indiana Public Service Commission. Acts of 1945, Chap. 53, p. 110. This act adds an additional section to the Indiana Public Service Commission Act aimed directly at the natural gas business, and by the act a "gas utility" was defined to mean and include "any public utility selling or proposing to sell or furnish gas directly to any consumer or consumers within the State of Indiana for his, its or their domestic, commercial or industrial use." Certainly appellee is selling and proposing to sell gas directly to consumers in Indiana.

The bottom question on this phase of the case is whether the appellee is furnishing gas in Indiana directly or indirectly to or for the public. Admittedly it is selling gas in Indiana indirectly to and for the public through distributing companies and that makes it a public utility under the Indiana statute, subject to regulation and control by the Indiana Public Service Commission. Also admittedly it is selling and proposing to sell gas directly to consumers within the state. This part of its business and its interstate transportation and its sales to local distributing utilities are so integrated that in any practical consideration of the state's right to regulate direct sales to consumers that activity must be appraised as a part of its entire business in Indiana. Its rights and duties, with reference to such direct sales, must be determined in the light of its over-all character in the State of Indiana. It will compete with local activities in soliciting industrial business and will be in position to discriminate in its service and in its rates and

in its regulations. This freedom is inconsistent with all concepts of the duties and obligations of a person or corporation engaged in such business.

The primary duty of a public utility is to serve on reasonable terms all those who desire the service it renders. This duty does not permit it to pick and choose and to serve only those portions of the territory which it finds most profitable, leaving the remainder to get along without the service which it alone is in a position to give. *United Fuel Gas Co. v. Railroad Commission* (1929), 278 U. S. 300, 309, 73 L. Ed. 390, 396; *Industrial Gas Co. v. Public Utilities Commission of Ohio* (1939), 135 Ohio St. 408, 21 N. E. (2d) 166, 168. From the last named case, we quote the following:

> "*It may well be urged that a corporation, calculated to compete with public utilities and take away business from them, should be under like regulatory restriction* if effective governmental supervision is to be maintained. Actual or potential competition with other corporations whose business is clothed with a public interest is a factor to be considered; otherwise corporations could be organized to operate like appellant and in competition with bona fide utilities until the whole state would be honey-combed with them and public regulation would become a sham and delusion.
>
> "What appellant seeks to do is to pick out certain industrial consumers in select territory and serve them under special contracts to the exclusion of all others except such private or domestic consumers as may suit its convenience and advantage. There were other industrial consumers with whom the appellant refused or failed to agree and so did not serve them. If such consumers were served at all, it must necessarily be by a competitor. If a business so carried on may escape public regulation then there would seem to be no valid reason why appellant may not extend the service to double, triple or many times the number now served without being amenable to regulative measures."

The law, as declared in *Industrial Gas Company v. Public Utilities Commission of Ohio, supra,* seems to us fair,

reasonable and logical and, when applied to the facts in the case before us, leaves appellee unquestionably in the position of a public utility subject to regulation.

The same thought which was behind the Ohio case, just cited and quoted, with which thought we agree, was also incorporated in *Re Potter Development Co.* (1939), 32 P. U. R., N. S. 45, decided by the Public Service Commission of New York. In that case, the Potter Company sold natural gas to the Corning Glass Works. The Potter Company obtained its gas from an interstate transmission line and piped it to the Corning Glass Works, which is located in the City of Corning, New York. The Glass Works was the only customer served by the Potter Company, but the interstate pipe line also furnished gas to an affiliate which, as a public utility, operated the gas distribution system in the City of Corning. There was a proceeding to determine whether the Potter Company was a public utility subject to regulation by the New York Public Service Commission. The Commission hold that it was, and, in support of its holding, argued that to hold otherwise would invite widespread circumvention of the Public Service law and would result in a multitude of companies supplying gas under special contracts in competition with public utilities and indicated that such a situation would be intolerable.

Reversed with instructions to enter judgment denying plaintiff the relief sought.

EMMERT, *J.* not participating.

## APPENDIX "B"

### OPINION OF RANDOLPH CIRCUIT COURT

In the Randolph Circuit Court, May Term, 1946

May 11, 1946

No. 5440

PANHANDLE EASTERN PIPE LINE COMPANY

*vs.*

THE PUBLIC SERVICE COMMISSION OF INDIANA

MACY, *J.*:

The plaintiff seeks to vacate, set aside and enjoin the enforcement of an order of the Public Service Commission of Indiana entered November 21, 1945, and an order supplemental thereto, dated April 9, 1946. These orders were made after a hearing pursuant to proceedings initiated by the Commission, and plaintiff was a party to these proceedings. The original finding of the Commission contained the following:

> "Nor is any issue presently involved as to any specific regulatory action by the Commission over the rates or service of Panhandle in Indiana in the case of sales direct to Indiana consumers other than the requiring of the filing of tariffs and reports. The fundamental question is whether the direct consumer sales of Panhandle are subect to regulation by this Commission in any respect."
>
> "The Commission concludes that the distribution in Indiana by Panhandle of natural gas direct to consumers is subject to regulation by this Commission under the laws of this State."

This finding was followed by an order that plaintiff file with the Commission tariffs covering rates, rules and regulations appertaining to any and all sales of natural gas by

it direct to ultimate consumers within the State of Indiana, an annual report for the years 1942, 1943, 1944 and each year thereafter as the same become due and so long as it continues to distribute gas direct to any consumer in Indiana, and file copies of its statements, filed with the Federal Power Commission. At the trial in this Court it was urged on behalf of the Commission that it might desire that such data be filed solely for purposes of information, whereupon plaintiff offered to furnish some for such purpose only and asked the Commission to modify its order insofar as it asserted any regulatory authority over plaintiff's sale to industrial consumers. This offer was rejected, such a conditional filing was declared to be no compliance with the order, and the Commission in its supplemental finding and order affirmed its purpose to use the information for all purpose required by the public service Commission Act, including the regulation of rates and service appertaining to the supplying of natural gas by Panhandle direct to consumers within the State of Indiana.

It will not serve any useful purpose to recite the facts involved in this proceeding; they have all been thoroughly discussed in oral argument and in the briefs and there is no disagreement as to any question of fact. I shall take up the law questions involved, in the order in which it seems to me they ought logically to be considered. The briefs of all the parties, plaintiff and defendant, the intervenors and the amicus curiae, have been of great help, for which the Court is very thankful.

First, the Court does not believe it is material whether plaintiff is held to be a public utility within the definition of that term found in Sec. 54-105 B. R. S. (1933) or whether under Sec. 4-603 plaintiff could be granted a franchise to operate a utility in Indiana. If plaintiff's business is interstate commerce, and if it lacks those local characteristics necessary to give the State the power to regulate it, then the State could not create any such power by legislation.

Next, does the State, thru the defendant Commission, assert the power to regulate it, and may the order of the Commission be so interpreted that, assuming that an at-

tempt to regulate plaintiff's business would be void, we may reasonably conclude the Commission proposes no such action. Because, unless it appears from the order that the Commission asserts regulatory jurisdiction and authority, and has ordered the filing of informative data as the first step in the process of regulation, then the Court should not in any event hold the order void, and questions of interstate commerce and local interest need not be considered.

The case of Arkansas Louisiana Gas Co. *v.* Dept. of Public Utilities, 58 S. Ct. 770 approaches, but does not decide, the precise question, because there the company which brought the gas into Arkansas exercised three functions: (1) delivery to selected industries for consumption; (2) delivery to public utilities for resale, and (3) distribution, as a public utility through a separate department. Since the operation was clearly both local and interstate, the information called for might be needed and would not materially burden or unduly interfere with the free flow of commerce between the States, and the Court declined to pass on the Constituti nal question.

Obviously, the Court did not consider that the Arkansas Commission had taken any step designed to regulate rates or service as to the interstate business.

In the Slattery case, 58 S. Ct. 299 injunction was refused because the Commission's order was not the first step in the direction of unconstitutional action, and because the Appellant had not asked the Commission to modify or limit its order and had not exhausted its remedy before the Commission. The Court said: "It will be time enough to challenge such action when it is taken or at least threatened."

In the Public Utilities Commission *v.* United Fuel and Gas case in 58 S. Ct. 369, the pipe line company admitted the right of the Commission to call for evidence for certain informative purposes, but denied the power of the Commission to fix rates; it offered the evidence on that basis, but the Commission refused it, and repeated its assertion of jurisdiction, whereupon the pipe line company sought injunction. While the case was pending, the Natural Gas Act was passed, and since the pipe line company was delivering its gas to a local distributing Company, the Fed-

eral Power Commission had sole jurisdiction over its rates. Therefore, the State Commission was without the jurisdiction which it asserted. Since the order was invalid, and the pipe line company had exhausted all administrative remedies before resort to the Court, and since the Commission had refused to eliminate from its order those provisions in conflict with the Federal act, the injunction was granted against enforcement.

While this case does not pass on the question whether the Commerce clause of its own force would invalidate the Commission's assertion of jurisdiction, it indicates that *if* the Commission's order asserts and proposes to exercise a regulatory power which is denied to the State because it conflicts with the federal law (whether by Act of Congress enacted in aid of the Commerce clause or by force of the Commerce clause itself would not seem material) then the party affected by such order need not wait until actual regulation is imposed. Indeed, this would seem in harmony with the Indiana Act which provides that any corporation adversely affected by any decision, ruling, order, determination, requirement or direction of the Commission may commence an action in the Circuit Court to vacate or set aside or enjoin the enforcement of the same on the ground that it is insufficient, unreasonable or unlawful. B. R. S. 54-429. The question presented here is whether the decision, ruling, order, determination, requirement and direction of the Commission is unlawful, and it seems clear to the Court that the plaintiff should not be compelled to furnish the Commission with all the information required, knowing that the Commission proposes to use it in regulating rates and service, and wait until a regulation is actually announced, before it can test the lawfulness of the order. It is not a question of testing an order to determine whether its results will be unreasonable or arbitrary or confiscatory, but whether the Commission had any power to make any order upon the particular subject. Such a question should be decided at the threshold. While it was argued, both orally and in the briefs, for the Commission that the action here is premature because the Commission might want the date for informative purposes only, yet in view of its original declaration that the "distribu-

tion" of natural gas direct to consumers is subject to regulation by this Commission, supplemented by its declaration that the information is to be used in and in connection with the regulation of rates and service appertaining to the supplying of natural gas by Panhandle direct to consumers, etc., it would appear that such a position is now wholly untenable.

Such being the Court's view of the law, the next question is whether the direct sales of gas to Anchor Hocking form a part of interstate commerce. There is a direct, continuous and unbroken flow of gas from the field in Texas to the factory in Indiana; the sale is by contract and the service is interruptible by Panhandle; measured by every available definition of the term, the sales to Anchor Hocking are wholesale, the general test being that of volume, or quantity; and "wholesale" being applied to sales of goods or merchandise to trading establishments, institutions, industries, etc., as distinguished from sales for personal or household consumption. See Roland Electrical Co. vs. Walling, 66 S. Ct. 413-421. The sale to Anchor Hocking is the termination of the interstate movement, i. e. it is made at the points where the parties originally intended that the movement should end. The interstate movement stops when the gas finally reaches Anchor Hocking lines. To say that the interstate character of the movement ceases the moment pressure is reduced seems to the Court a highly artificial process of reasoning. If that were true, then Congress was without authority to take jurisdiction over the sales to utilities for resale; it is not possible for the Court to follow the movement of the gas in the main line, at 200 pounds pressure, thru a regulator where its pressure is reduced to 100 pounds and say that it is still in interstate movement, but that when this line divides, and the pressure in each branch is reduced to 90 pounds, that which flows into the branch leading to the Indiana Ohio Public Service Company is still in interstate movement while that which flows into the branch leading to the Anchor Hocking Glass Company is in intrastate movement. Congress regulates the one sale because it is interstate and if it had chosen to regulate the other the Court does not believe it would have been urged seriously that it was intrastate. Highly re-

fined processes of reasoning are frequently used to justify a desired result, and some court may be able to convince itself that such a transaction as that here involved is an intrastate transaction; this court has been unable to complicate and confuse the problem sufficiently to arrive at such a conclusion. If, as the Court said in Colorado Wyoming Gas Co. vs. Federal Power Commission, 65 Sup. Ct. 850, sales in interstate commerce do not end until the gas enters the service pipes of the distributing company, I see no reason why, when destined to a factory, they should end until the reach the service pipes of the factory. I can see no reason, altho the distinction may be arbitrarily made, for believing that a sale for consumption is intrastate, while a sale for resale is interstate. Nor is the Court able to even comprehend the idea that the delivery of the gas in Indiana is an intrastate transaction altho the transportation up to the point of delivery is interstate. The sale is all by contract, delivery is part of the terms of the sale, the ultimate goal of the transportation is the delivery of the goods without which there would be no transportation; commerce implies buying and selling. This branch of the problem seems too simple to get confused about, although in stating it this way the Court is aware of the pitfalls of over-simplification against which we have recently been warned by high authority.

Before passing to the question which remains, it will be proper to state that the Court assumes that all parties agree to the proposition that any effort by the State to enforce a selling price on goods moving in interstate commerce places a direct burden on interstate commerce with that freedom which it was the purpose of the commerce clause to preserve.

Simpson vs. Shephard, 33 S. Ct. 729;
Public Utilities Comm. vs. Attleboro, 47 S. Ct. 294.

But assuming that the sales here involved are in interstate commerce, and that Congress has not acted to prevent State regulation, are the transactions of such character that the State may not, i. e. May the State regulate rates and service as long as Congress does not choose to enter the field?

The Court is asked to determine what the intent of Congress was in enacting the Natural Gas Act ,Title 15 USCA Par. 717 et seq. and 717 f, Suppl.) and by reference to remarks made when the legislation was under consideration to conclude that Congress believed that all sales for consumption were subject to state regulation, it having been so held in the Pennsylvania Gas case. The Court has carefully read the act and finds no ambiguity in it. It does not seem therefore, that we can resort to extraneous matters to determine the legislative intent, or to consider what this witness or that thought or said he thought the law was when testifying before the legislative Committee, or what the Committee having the bill in charge said in its report when it presented the bill for passage. The Act as a whole is clear and must be held to express the intent of Congress as it stands. Authorities in support of this view of the law are numerous, and some are cited in the briefs, so that repetition here is unnecessary.

It is also urged that Congress, by saying nothing on the subject of direct interstate sales to industrial consumers, should be held to have thereby assented to State regulation of such transactions. The Court's view, obtained from the authorities, is this:- that the grant of power contained in the Constitution establishes the immunity of the commerce from direct control of the States; if, embraced within the grant there are subjects of such nature that it is not possible to derive from the Constitutional grant an intention that they should remain uncontrolled until Congress acts, and if they are matters of local concern, the States may extend their powers as to such subjects. Where the subject is National in character, admitting and requiring uniformity of regulation, affecting alike all the States, Congress alone can provide the needed regulations, and in such cases the failure of Congress to act is tantamount to a declaration that the subject shall be free from regulation. By the Constitution the people gave to Congress the power to regulate commerce within the several states; if Congress has failed to legislate upon any particular subject within that grant, the question is whether the subject is so affected with a local, rather than a National interest that Congress must have necessarily felt that the States

rather than the Federal Government, should regulate them, then the power of the States to regulate that subject will be inferred from the failure of Congress to act. Numerous examples of the application of this principle are cited and discussed in the briefs. So it appears that there can be no understanding of the principle of Congressional silence without an understanding of the nature of the subject which it is claimed is affected thereby. In the case at bar, that subject is the interstate transportation, sale and delivery of natural gas to an industrial consumer, in wholesale quantities, under contract.

Counsel for all parties, and the amicus curiae have so thoroughly discussed the many cases having or appearing to have some bearing on the real question involved here, that it would serve no purpose to again discuss them, but it is only fair to counsel that the Court mention some of these cases which seem to best expound the principles which must be applied in deciding this case.

The Landon case in 39 S. Ct. 268 involved the transportation of gas through pipe lines from one State to another, and its sale at destination to local distributing companies. The Court held that the interstate character of the transaction up to that point could not be doubted, but that the subsequent sale of the gas by the distributing companies, to consumers at retail and in due course of their own local business was no part of interstate commerce. (Decided 3-17-1919)

The Pennsylvania Gas case involved transportation of gas from Pennsylvania into New York, where distribution and supply to ultimate consumers in the City of Jamestown was effected by the transporting company, the service being similar to that of a local plant furnishing gas to consumers in a city. Justice Day, in deciding the case, said the transmission being direct, without intervention between buyer and seller, was a transmission in interstate commerce, but the local service was not of that character which requires general and uniform regulation of rates by Congressional action, and while local rates might affect the interstate business of the Company yet the State might make local regulations of a reasonable character. The power of the Public Service Commission to regulate rates for such local service was upheld. 40 S. Ct. 279. (Decided 3-1-1920.)

I do not understand this case to rest entirely on the fact that the sales were to ultimate consumers, or to decide that the line of demarcation between local interest and national interest depends on whether the sale is to ultimate consumers, residents of the State, or to a distributing Company for resale. The first phase of the Court's opinion distinguishes the case, on its facts, from the Landon case, where the interstate movement ended when the gas passed into the local mains for distribution; this phase of the opinion is only the Court's introduction to a holding that in the case before it the gas is transported directly to the consumers without any intervention between seller and buyer and the transaction is therefore interstate. The Court then proceeds to discuss the power of the State to regulate, altho part of an interstate transmission, the furnishing of the gas to local consumers, on the ground that it is local in character, is required in the public interest, and has not been attempted by Congress. The facts the Court considers in determining that the business is the subject of State regulation are that "the service is essentially local, and the sale of gas is to local consumers who are reached by the use of the streets of the City in which the pipes are laid, and through which the gas is conducted to factories and residences as it is required for use. The service is similar to that of a local plant furnishing gas to consumers in a city." It seems to the Court that *all* of these facts, not the single one that the sale is to *ultimate consumers*, entered into the Court's finding that the business might be regulated by the State.

The case of State ex rel., Barrett *vs.* Kansas, etc., 44 S. Ct. 544 (decided May 26th, 1924) denied the power of a State Commission to regulate wholesale prices of gas transported in interstate commerce. In so doing the Court remarked that the line of division between cases where in the absence of Congressional action, the State is authorized to act, and those where State action is precluded by mere force of the Commerce Clause of the Constitution, is not always clearly marked; that in the absence of Congressional legislation a state may impose taxes, enact inspection laws, quarantine laws and generally, laws of internal police, although they may have an incidental effect upon interstate

commerce. But (quoting from the Minnesota Rate Case) if a state enactment imposes a direct burden upon interstate commerce, it must fall because the State may not directly restrain that which in the absence of Federal regulation should be free. It is contended that public interest requires that the business be regulated, yet Congress by its silence in effect declares the commerce shall remain free of regulation. The Court further points out that the Pennsylvania case is distinguishable because there the gas after reaching destination, was subdivided and sold at retail and the service to consumers was essentially local. Finally, the Court says that the business of supplying, on demand, local consumers is a local business, regardless of whether the distribution is made by the transporting company or by independent distributing companies. But here the gas is sold in wholesale quantities, not to consumers but to distributing companies for resale to consumers, etc., hence the paramount interest is not local but National, requiring uniformity of regulation, even tho it be the uniformity of governmental nonaction, to preserve equality of opportunity and treatment among the various communities and States concerned.

On January 3rd, 1927 the Supreme Court decided the Attleboro Case (47 S. Ct. 294) which, while it deals with electricity instead of gas, reiterates the principle of the previously noted cases, that sale of electric current generated in one State and delivered to a purchaser in another is a transaction in interstate commerce; that the latter State has no authority to fix the price at which the generating company must sell current to the receiving company, and any attempt to do so must fail by force of the commerce clause regardless of its purpose. In support of the State's power to regulate these rates it was urged that the distributing company's rate could not be effectively regulated without regulating the original sale price of the current, that the high cost of the latter was necessarily passed on to the ultimate consumers and therefore it became a matter essentially local, affecting interstate commerce only indirectly. This argument was rejected by the court, after a careful review of the Pennsylvania and Kansas gas cases.

On May 18th, 1931 the Supreme Court, in the East Ohio Gas case (51 S. Ct. 499) reiterated the principles of the

Landon, Kansas Gas and Attleboro cases, and explained the distinction between the interstate transaction, not subject to State regulation, and the subsequent distribution by the numerous small service lines and pipes, where the gas is held ready to serve as needed, comparing the process to the breaking of an original package in order that its contents may be prepared and sold at retail. The latter process is declared to be not interstate commerce, but a business of purely local concern, exclusively within the jurisdiction of the State, and the opinion in the Pennsylvania Gas case to the extent that it may conflict with such holding, is disapproved.

The Cities Service case reported in 85 S. W. 890 (1935) discusses the foregoing cases and holds that transportation and delivery of gas from one state directly to an industrial consumer in another pursuant to contract and in continuous movement, is interstate commerce and the State Commission has no jurisdiction over the same.

From these authorities it appears that at the time Congress started consideration of Federal legislation on the subject in 1935, the courts had laid down certain pretty well defined rules for both Federal and State legislature to go by. It had been made clear that the State could not regulate rates and service as long as the service was interstate, tho they could adopt certain local regulations of such reasonable character as not to impose any direct burden on the commerce. It has been made equally clear that once the interstate movement came to rest at its destination, the subsequent distribution to consumers within the State would be intrastate and subject to State regulation, and it had been clearly held that if the transporting company chose to break up its interstate shipment and hold same in service lines and pipes ready to move forward for consumption as needed that would be a local transaction that the State could regulate. That there were in existence at the time Congress acted many instances where the gas was piped directly to industrial consumers and delivered, not on demand, but under contract, is evident; that Congress could have expressly assumed regulatory jurisdiction of such transactions is likewise evident, and that it did not choose

to do so is clear from the Act itself. Nor do I find that such industrial sales were actually being regulated by the States, altho, as noted, regulation had been at times attempted.

The Southern *vs.* Alabama case was decided in 1937 (57 S. Ct. 696). There the interstate carrier had four customers in Alabama, three being public utilities and the fourth an industrial consumer. There was a continuous movement from the wells in Louisiana to the point of delivery in Alabama, where it was reduced in pressure, measured for purpose of effecting delivery and transported thru the seller's service pipes to various widely separated plants of the consumer, where it was finally delivered. The seller maintained an office in Alabama where orders were taken from time to time for the gas as required by the Industry. The Court perceived no essential difference between the establishment of such a local activity to meet the needs of consumers in industrial plants and the service to consumers in the municipalities which was found in the Ohio case to constitute an intrastate business, and upon that basis sustained a franchise tax for privilege of doing an intrastate business, which tax the Court found to be of such character that it did not discriminate against interstate commerce or otherwise lay a direct burden upon it.

After the passage of the Natural Gas Act the Illinois Commerce Commission attempted to regulate the service of Illinois Natural Gas Co. This company maintained lateral transmission lines in Illinois, which received gas from Panhandle at points in Illinois, pressure being reduced at such points. This gas was then delivered at further reduced pressure, to various local public utilities which in turn delivered it to the consuming public. The Illinois Supreme Court discussed the East Ohio, Kansas Gas, Attleboro and Alabama cases, and decided that the local interest was paramount and the national interest of minor importance, noting that the Commission made no effort to regulate the transmission or delivery until the gas had left the high pressure lines, its pressure reduced, and delivered to the intrastate lines ready for delivery to intrastate utilities. It held that the Natural Gas Act, being effective only over

interstate commerce, did not apply. (See 32 N. E. (2d) 157.)

This case was finally decided by the Supreme Court (1-5-42; 62 S. Ct. 384); the opinion pointed out that in the Southern Gas *vs.* Alabama case "on which the Illinois Supreme Court relied, we held only that the sale of gas to a local industrial consumer by one who was piping the gas into the State was a local business sufficient to sustain a franchise tax on the privilege of doing business within the State, measured by all the taxpayer's property located there, including that used for wholesale distribution of gas to local public service companies." The Court holds that the Natural Gas Act gives to the Federal Power Commission sole jurisdiction over such matters as the extension of facilities and denies to the Illinois Commission any regulatory power over the same. Upon what principle would the Court have relied in the absence of the Federal Act, the mechanical test or a balancing of the interest of the State against the effect the regulation would have on the commerce in its National aspect? The Court poses the question and with evident satisfaction notes that no answer is required.

At this point it is well to note that the Court in the Hope Gas Co. case, decided 1-3-1944 and reported in 64 S. Ct. 281, quoting from the Illinois Gas case, supra, gave its interpretation of the purpose of the Federal Act as being to occupy the field in which the Kansas case and the Attleboro case had held the States might not act, taking no authority from State Commissions, and complementing the regulatory authority of the States. State Commissions were thwarted in local regulations because they could not discover what it cost interstate pipe line companies to deliver gas within the consuming states.

It must be observed that the cases mentioned in these remarks by the Court were not concerned with direct sales to industrial consumers, and that since the enactment of the Federal Act State Commissions are able to obtain all necessary cost figures from the Federal Commission. I do not find in any of these cases any interest being manifest in the industrial consumer or in the effect industrial sales,

service and rates have or may have on the states, or their citizens or their public utilities.

In a matter such as we are concerned with here, one might expect to extract from the language of some opinion of the Supreme Court some dictum indicating that the Court conceded, or assumed, or thought everyone else assumed, that the States were regulating or had the right to regulate such direct sales to industrial consumers, and there are some cases which to one of an optimistic turn of mind, might be thought helpful.

In the Panhandle case in 65 S. Ct. 821 (4-2-1945) the Federal Power Commission was concerned with fixing rates for sales to distributing companies, and it is made clear by the Court that while the Commission may not fix industrial rates, it may take those rates into consideration when it fixes the rates for interstate wholesale sales which are subject to its jurisdiction.

Whether the case of Colorado Co. *vs.* Federal Power Commission, 65 S. Ct. 829 (also decided 4-2-1945) clarifies or only further confuses the matter, is debatable. It does expressly recognize three distinct types of business: (a) intrastate transportation and sale; (b) interstate transportation and sale to industrial users; and (c) interstate transportation to distributing companies for resale. It repeatedly refers to (c) as a wholesale transaction, altho from the date referred to it is evident that that term must have been used merely as a convenient means of designation, for the direct sales to one industry alone were greater than the amount of gas consumed by all the inhabitants of Denver. The opinion refers to the industrial business as an unregulated business (neither the State of Colorado nor the Federal Power Commission having attempted to regulate it) and finds that the price was a bargained one, arrived at thru competition with other fuels. (The Colorado Wyoming Gas case, decided the same day, 65 S. Ct. 850, is of interest because it reaffirms the doctrine of the earlier cases, viz: that the interstate commerce does not end until the gas enters the service pipes of the distributing companies.)

In the Southern Pacific Co. *vs.* Arizona case, 65 S. Ct. 1515 (decided June 18, 1945) the Court, recognizing the power of the State to make laws governing matters of local

concern, altho in some measure they might affect or even regulate interstate commerce, warned that this does not include the power to impede substantially the free flow of commerce, or to regulate those phases of the National commerce which because of the need of national uniformity, demand that if there is to be any regulation, it should be by a single authority. It is not important whether this distribution of power between State and National Governments is based on the commerce clause itself, or on the presumed intention of Congress, where Congress has not spoken. Some enactments are plainly within and others plainly without the State power, and between these are the numerous cases where regulation of local matters may also operate as a regulation of interstate commerce. As to these, we can only reconcile the conflicting claims by appraisal and accommodations of the competing demands of the State and National interests involved. The commerce clause itself affords protection from State legislation inimical to the National Commerce, and the Court and not the State legislature is the final arbiter of these competing demands.

Altho many more case have been examined by the Court, only two more will be cited.

The first, Sioux City *vs.* Missouri Valley Co., 46 Fed. 2nd 819, was decided in 1931 and in some respects is in point here. It is quoted at length in plaintiff's brief but does not receive honorable mention in the others, presumably because it is not concerned with regulation, and is a lower court decision. The Judge who decided it carefully reviewed the Landon and Pennsylvania cases, and weighed the facts to determine whether the particular transaction involved was National in its character and therefore free, or local in its character and therefore subject to local regulation until Congress should see fit to act. The Court finally posed the question: May they (the Industries) purchase gas in interstate commerce and have it brought in for their own consumption under particular and private contracts with a concern engaged in such interstate commerce, but not engaged in any local public business? And answered it in the affirmative. The point in issue was the right of the City to require the pipe line company to obtain the consent of the city before laying its pipe over a bridge into the City and

the Court denied such right solely on the ground that it would be a direct burden on interstate commerce.

The other case is Columbia Gas and Electric *vs.* United States, 151 F. (2d) 461 where, in discussing the operation of plaintiff and its subsidiaries, the Court said: "Columbia was engaged in the production, transmission and sale of natural gas to both industrial and domestic consumers in Kentucky, West Virginia, Ohio, Indiana and other states. The Columbia subsidiaries served both domestic and industrial consumers and so were public utilities subject to the rules and regulations of State Public Utilities Commissions and the provisions of municipal franchises under which they operated. The result was that they could not contract with industries at fixed rates for definite periods because of the power of State and Municipal Authorities to change their rates and to require them to give preference to domestic consumers when gas was insufficient for both. The subsidiaries of American Fuel served only industrial users under private agreements, and all plans for expansion of the American Fuel System contemplated strict adherence to that policy. Being free from constraint by municipal franchises and state regulations, they had a substantial competitive advantage over Columbia whenever they came into competition with it." Later on in the opinion the Court says: "Columbia was fully conscious of the threat * * * that these organizations would present with the competitive advantage afforded by their immunity from State and Municipal regulation."

This Court has searched diligently for authority upon which the power asserted by the Public Service Commission might be upheld, but if such power exists it will have to be discovered by some intelligence more acute than that to which the parties here have submitted this controversy. If the rule were that Congress, by failing to legislate on interstate sales to industrial users, must be held to have tacitly conferred upon the States jurisdiction in such matters, there would be no difficulty here, but that clearly is not the rule unless we can say that the business is so affected with a local, rather than a National interest that the States, rather than the Federal Government should regulate it. It is that predominant local interest that this Court is unable

to see. That the transaction here belongs to interstate commerce and therefore to the National Government seems clear; that the State proposes to regulate rates is established; that rate regulation is considered by the Courts to be the imposition of a direct burden, or restraint, is conceded, and that for the State to impose a direct burden on interstate commerce is forbidden is not open to argument. If Congress considers that each state should have the right to impose its own regulations on this industrial business, it can say so, or if it determines that this business should be brought under the control of the Federal Power Commission it can do that; but in the meantime the State must not exercise powers which belong exclusively to Congress.

The constitutionality of the Commission's acts is to be determined solely by reference to the limits imposed by the Constitution; the question is not whether regulation is needed, or advisable in the public interest, but is one of power. From the Commerce Clause of the Constitution itself, the Supreme Court decisions, the discussions and reports in Congress, and the provisions of the Natural Gas Act itself, the conclusion seems reasonable that at the time Congress passed the Act it was not concerned about industrial sales and with any effect they might have on the utilities engaged in distribution, and did not consider that by its silence it was authorizing the States to regulate them.

The people, by giving Congress exclusive power to regulate interstate commerce, left it free of all restraint except that which Congress might impose or permit the States to impose. So, if the matter is one that ought to be under the control of one authority, and Congress does nothing, then nothing can be done.

It would seem that importation of goods from one State to another is a National matter, and if it is to be regulated, Congress should do it.

It is here urged that it is of great importance to the local consumers that Panhandle be not permitted to raid the utilities by taking away their industrial consumers. Granting this, yet the high desirability of regulation cannot create the power to make it, and it seems the more logical view of the matter to urge that since these transactions spread from Oklahoma and Texas, thru Kansas, Missouri,

Illinois, Indiana, Ohio and Michigan, each one of which states would presumably be interested in looking to the welfare of its own consuming public, and since the industries supplied are themselves engaged in interstate commerce, a National, rather than a local problem, is presented, and it would be greatly complicated by the imposition of as many sets of rates and regulations as there are State Commissions to impose them. State regulation might prevent discrimination as between communities within the State, and it might protect the private consumers who buy gas from the various local utilities, by regulating the price the industrial consumers should pay as well as the quantities they should be allowed to use, and perhaps in other ways, but how could it preserve equality of opportunity and treatment among the various States concerned? In the competition between the demands and requirements of one State and those of all the States concerned, how can there be any adjustment except it be made by one authority? It seems to the Court that this problem is one requiring uniformity of control, if it is to be controlled, and that to permit the State of Indiana to do what it here proposes, viz: regulate rates and service, would be to permit it to exercise a function beyond its power.

The finding will be for the plaintiff and judgment and decree will be entered accordingly. Counsel for the plaintiff are requested to prepare and submit such finding, judgment and decree to the Court, with a copy thereof to the Attorney General, to counsel for the intervenors and to the amicus curiae. The Court's minutes, entered as of the date below, are as follows:

> "The Court, having heretofore heard the evidence and taken this matter under advisement, now finds for plaintiff on its complaint and renders its judgment, order and decree upon said finding, as follows: (Entry to be copied when signed by the Judge.)"
>
> (S.) JOHN W. MACY,
> *Judge.*

May 11, 1946.

## APPENDIX "C"

ORDER OF THE PUBLIC SERVICE COMMISSION OF INDIANA

November 21, 1945

BEFORE THE

# Public Service Commission of Indiana

IN THE MATTER OF THE INVESTIGATION BY THE COMMISSION IN RESPECT OF THE DISTRIBUTION BY PANHANDLE EASTERN PIPE LINE COMPANY, AS A PUBLIC UTILITY, OF NATURAL GAS TO CONSUMERS WITHIN THE STATE OF INDIANA.

Cause No. 16741

## COMMISSION ORDER

LEROY E. YODER, Chairman
LAWRENCE E. CARLSON, Commissioner
LAWRENCE W. CANNON, Commissioner
SAM BUSBY, Secretary

BEFORE THE

# Public Service Commission of Indiana

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| IN THE MATTER OF THE INVESTIGATION BY THE COMMISSION IN RESPECT OF THE DISTRIBUTION BY PANHANDLE EASTERN PIPE LINE COMPANY, AS A PUBLIC UTILITY, OF NATURAL GAS TO CONSUMERS WITHIN THE STATE OF INDIANA. | Cause No. 16741<br>Order and Opinion Approved Nov. 21, 1945. |

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## COMMISSION ORDER

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APPEARANCES:

For the Commission — FRANK COUGHLIN, URBAN C. STOVER, *Deputy Attorneys General.*

For the Public — GLENN R. SLENKER, *Public Counsellor.* ROBERT E. JONES, WILLIAM F. DUDINE, *Assistant Public Counsellors.*

| | |
|---|---|
| For Respondent, Panhandle Eastern Pipe Line Company | JOHN S. YOST,<br>CRUMPACKER, MAY, CARLISLE & BEAMER,<br>By George N. Beamer.<br>BARNES, HICKAM, PANTZER & BOYD,<br>By Kurt F. Pantzer,<br>Allen W. Boyd. |
| For Intervenor, Central Indiana Gas Company | GEORGE B. PIDOT,<br>VANATTA, BATTON & HARKER,<br>By Robert R. Batton. |
| For Intervenor, Greenfield Gas Company, Inc. | WILLIAM A. MCCLELLAN. |
| For Intervenor, Kokomo Gas & Fuel Company | JOHN E. FELL. |
| For Intervenor, Northern Indiana Public Service Company | LAWYER & ANDERSON,<br>By John S. Lawyer,<br>R. Stanley Anderson. |
| For Intervenor, Public Service Company of Indiana, Inc. | EVANS & HEBEL,<br>By William P. Evans,<br>Edmond W. Hebel. |
| For Intervenor, Southern Indiana Gas & Electric Company | ORTMEYER, BAMBERGER & ORTMEYER,<br>By Edmund F. Ortmeyer. |

**BY THE COMMISSION**

**CANNON—Commissioner**

On October 13, 1944, the following order in this cause No. 16741 was issued by this Commission, to-wit:

"Public Service Commission of Indiana, having summarily upon its own motion investigated the matter of the operations of Panhandle Eastern Pipe Line Company in distributing natural gas as a public utility within the State of Indiana, has reason to believe that said Panhandle Eastern Pipe Line Company has heretofore, without the approval of this Commission, purported to take over and acquire certain property and franchise rights used and useful in rendering public utility natural gas service to consumers within the State of Indiana, that said Panhandle Eastern Pipe Line Company has heretofore and is now engaged, as a public utility, in the retail sale of natural gas within the State of Indiana, that said Panhandle Eastern Pipe Line Company has not heretofore had and does not now have on file with and approved by this Commission any schedule of rates, rules and regulations covering sales of natural gas by it to consumers in the State of Indiana, that said Panhandle Eastern Pipe Line Company has not filed with this Commission any annual or other reports in respect of its operations within the State of Indiana, and that said Panhandle Eastern Pipe Line Company may in various respects be violating provisions of the Public Service Commission Act and orders of this Commission applicable to it and its operations.

And it appearing to this Commission from its said investigation that sufficient grounds exist to warrant a formal hearing being ordered as to the matters heretofore investigated, this commission hereby furnishes to said Panhandle Eastern Pipe Line Company, pursuant to the requirements of

Section 62 of the Public Service Commission Act, this statement notifying said Panhandle Eastern Pipe Line Company of the matters under investigation, which are as follows, to-wit:

1. The facts and circumstances under which said Panhandle Eastern Pipe Line Company has purported to acquire and hold any property, or franchise or other rights, used or useful in or in connection with sales of natural gas to the Anchor-Hocking Glass Corporation, a consumer of natural gas within the State of Indiana, or to any other consumer or consumers of natural gas within the State of Indiana.

2. The nature, period and extent of natural gas service by said Panhandle Eastern Pipe Line Company to said Anchor-Hocking Glass Corporation, or any other consumer of natural gas within the State of Indiana, and the right, if any, of said Panhandle Eastern Pipe Line Company to render any such service.

3. The matter of the failure of said Panhandle Eastern Pipe Line Company to file with this Commission any tariffs, rules and regulations appertaining to natural gas service to such consumer or consumers as it serves within the State of Indiana.

4. The matter of the failure of said Panhandle Eastern Pipe Line Company to file with this Commission an annual report for the calendar year 1942 and the calendar year 1943, or either of them.

5. The matter of the failure of said Panhandle Eastern Pipe Line Company to file with this Commission an original cost report appertaining to its

property used and useful in rendering natural gas service to consumers within the State of Indiana.

6. Whether or not said Panhandle Eastern Pipe Line Company is a corporation organized under the laws of the State of Indiana.

7. Whether or not said Panhandle Eastern Pipe Line Company now has, and has had at all times while it has been selling natural gas to consumers within the State of Indiana, an office in the State of Indiana, and has kept thereat all books, accounts, papers and records required by this Commission to be kept within the State of Indiana.

8. Whether or not said Panhandle Eastern Pipe Line Company has failed to keep any book, account, paper or record required to be kept by it under the orders of this Commission or has failed to comply with any direction of this Commission relating to any such book, account, paper or record.

9. Whether or not said Panhandle Eastern Pipe Line Company in any other respect is failing or has failed to comply with, abide by and conform with any applicable provisions of the Public Service Commission Act or of the orders and regulations of this Commission.

Dated at Indianapolis, Indiana, this 13th day of October, 1944.

By order of the Public Service Commission of Indiana.

Hugh W. Abbett /s/
Chairman.

SEAL

Attest:
Glen L. Steckley /s/
Secretary."

**ABBETT, CANNON AND BARNARD CONCUR:**

**APPROVED: October 13, 1944**

Due notice was given that this cause would be heard in the rooms of the commission, 401 State House, Indianapolis, Indiana, on November 20, 1944, at 2:00 P. M. Said notice was approved October 30, 1944 and is as follows:

"Whereas the Public Service Commission of Indiana, by its order made in the above entitled cause on October 13, 1944, determined that sufficient grounds existed to warrant a formal hearing being ordered as to matters under investigation by the Commission, as set out and contained in said order of October 13, 1944, and whereas a certified copy of said order of October 13, 1944, containing a statement of the matters under investigation was sent to the Panhandle Eastern Pipe Line Company by registered mail on October 14, 1944.

Now therefore, the Commission sets this cause for public hearing upon the matters set out in said order of October 13, 1944, and all matters pertinent thereto, to be held at the Rooms of the Commission, 401 State House, Indianapolis, Indiana, on November 20, 1944, at 2:00 P. M.

It is further ordered that said Panhandle Eastern Pipe Line Company shall appear at such hearing and shall produce testimony and evidence, consisting of its books, records, contracts and documents pertaining to the matters under investigation as set out in said order of October 13, 1944, and that at such hearing opportunity will be afforded said

Panhandle Eastern Pipe Line Company to produce any evidence it may offer pertaining to said matters under investigation.

The Secretary of this Commission is hereby ordered and directed to forward to said Panhandle Eastern Pipe Line Company, by registered mail, a certified copy of this order. Dated at Indianapolis, Indiana, this 30th day of October, 1944.

By order of the Public Service Commission of Indiana."

**ABBETT, CANNON AND BARNARD CONCUR:**

**APPROVED: October 30, 1944**

Said notice was duly printed and published in the Winchester News, a newspaper of general circulation printed in the English language and published in the City of Winchester, Randolph County, Indiana, on November 1, 1944; also in The Indianapolis Times, a newspaper of general circulation printed and published in the English language in the City of Indianapolis, Marion County, Indiana, on November 1, 1944; also in the Hoosier Sentinel, a newspaper of general circulation printed and published in the English language in Indianapolis, Marion County, Indiana, on November 3, 1944, and also in the Times Gazette, a newspaper of general circulation printed and published in the English language in the City of Union City, Randolph County, Indiana, on November 9, 1944.

Said notice was duly received by the respondent Panhandle Eastern Pipe Line Company (Panhandle).

In response to the notice dated October 30, 1944, Panhandle alleged that "any action or order of the Public Service Commission of Indiana herein purporting to regulate, interfere with, or otherwise affect the sale and delivery by Panhandle Eastern Pipe Line Company to Anchor-Hocking Glass Company of natural gas transported by Panhandle in interstate commerce would unduly and unlawfully burden interstate commerce in violation of Article 1, Section 8 (3) of the Constitution of the United States, and that if sections 54-112 et seq. Burns Indiana Statutes Annotated, 1933, or any other Indiana statute, is construed to purport to authorize said commission to regulate, interfere with or otherwise affect such sale and delivery, such statutes as so construed are unconstitutional and void because in violation of Article 1, Section 8 (3) of the Constitution of the United States, and denies:

(a) that it sells natural gas in Indiana except as a part of interstate commerce;

(b) that it is engaged in intrastate commerce in the State of Indiana;

(c) that it has transacted or is transacting within the State of Indiana any business as a public utility within said state;

(d) that the sale and delivery of natural gas transported by it in interstate commerce directly to an industrial consumer is subject to the jurisdiction of the Public Service Commission of Indiana;

(e) that it is in any manner subject to the jurisdiction of said commission;

(f) that said commission has any right, power or authority to institute this proceeding against it;

(g) that the statutory provisions under which this action is instituted (Secs. 54-412, et seq. Burns Indiana Statutes Annotated, 1933) authorizing investigation by said commission of matters relating to any public utility, have any application to it or its business;

(h) that it is under any obligation to comply with any Indiana statute or any order of said commission relating to public utilities within the State of Indiana; and

(i) that its business or any part thereof is subject to regulation of any character by said commission."

On or prior to November 20, 1944, Central Indiana Gas Company (Central Gas), Greenfield Gas Company, Inc. (Greenfield Gas), Kokomo Gas & Fuel Company (Kokomo Company), Northern Indiana Public Service Company (Northern Company), Public Service Company of Indiana, Inc. (Service Company) and Southern Indiana Gas & Electric Company (Southern Indiana), each of which was a public utility engaged in supplying natural gas to consumers within the State of Indiana, filed with the Commission respective applications for leave to intervene and be heard in this cause. At the hearing on November 20, 1944, the Commission con-

sidered said applications and granted each of said applicants leave to intervene and be heard herein.

At said hearing, all appearances were entered as above stated except that Mr. Frank Coughlin, Mr. Urban C. Stover, Mr. Glenn R. Slenker, Mr. Robert E. Jones, Mr. George B. Pidot, Mr. Kurt Pantzer, Mr. R. Stanley Anderson and Mr. William P. Evans entered their respective appearances for their respective clients at later hearings of this cause.

At the hearing on November 20, 1944, it was, with the approval of the Commission, agreed between the Public Counsellor, counsel for Panhandle and the respective counsel for the intervenors that the parties to the proceedings would endeavor to agree upon, and would file in this cause, a Stipulation of Facts; that any stipulated facts would be subject to objection as to relevancy and materiality by any party thereto if such objection was made within such time as the Commission should fix; and that the stipulated facts could be supplemented and other facts could be shown by oral testimony taken and exhibits offered at a hearing.

The hearing was then continued to December 4, 1944, to permit time for the working out of the proposed Stipulation of Facts. By subsequent orders of the Commission the date of further hearing was further continued from time to time to January 9, 1945, at which date a Stipulation of Facts (Stipulated Facts), dated January 9, 1945, signed by the Public Counsellor, counsel for Panhandle and counsel for all the respective

intervenors was introduced and received in evidence. At such hearing, counsel for Panhandle filed objections to the relevancy and materiality of certain parts of the evidence contained in the Stipulated Facts; and the Public Counsellor and counsel for the intervenors all advised the Commission that they raised no objections to the reception and consideration by the Commission of any of the Stipulated Facts. At said hearing the parties in this cause also advised the Commission that they had been unable to agree upon a stipulation in respect of certain matters, and requested the Commission to fix a time for the taking of oral evidence and the production of exhibits in respect of such matters or of matters supplementary to the Stipulated Facts which any of the parties might desire to offer. The Commission fixed February 6, 1945, as the date for such further hearing. Subsequently by orders of the Commission the date for such hearing was, for cause shown, continued from time to time until March 28, 1945, at which time a Stipulation of Evidence, including exhibits thereto, were offered by all the parties hereto, and oral testimony and exhibits were offered by the Public Counsellor and by certain of the intervenors. Most of such proffered evidence was received by the Commission, subject to its later ruling upon objections by counsel for Panhandle to the relevancy and materiality of certain parts thereof.

The evidence offered in this cause consists of the following:

A. The Stipulated Facts, including the exhibits attached thereto as a part thereof.

B. A Stipulation of Evidence, dated March 28, 1945, including the exhibits attached thereto as a part thereof.

C. Oral testimony presented at the hearing on March 28, 1945, by William F. Lebo, then the Acting Chief Engineer of the Commission and now its Chief Engineer, who was called as a witness by the Public Counsellor, and by L. B. Schiesz, First Vice-president of Service Company, by Guy T. Henry, President of Central Gas, and by Edward M. Hahn, President and General Manager of Kokomo Company, who were called as witnesses by the respective respondents with which they are connected.

D. The record of the testimony of Oscar W. Morton, Rate Engineer of Panhandle, before the Federal Power Commission on February 26, 1945.

E. Supplemental Stipulation of Facts, dated October 3, 1945, including the exhibits attached thereto as a part thereof.

F. The following exhibits (in addition to the exhibits attached to and identified in the Stipulated Facts, the Stipulation of Evidence and the Supplemental Stipulation of Facts):

**Commission:**

No. 1—Proof of publication of notice of hearing in the Gazette, Winchester, Indiana.

No. 2—Proof of publication of notice of hearing in The Indianapolis Times, Indianapolis, Indiana.

No. 3—Proof of publication of notice of hearing in the Hoosier Sentinel, Indianapolis, Indiana.

No. 4—Proof of publication of notice of hearing in the Times Gazette, Union City, Indiana.

No. 5—Notice of investigation in this cause, issued by the Commission on October 13, 1944.

No. 6—Order issued by the Commission in this matter on October 30, 1944, setting this matter for hearing.

**Public Counsellor:**

No. 1—Analysis of sales of gas to ultimate consumers in Indiana and statement of gas property and plant investment, etc.

No. 2—Copy of resolution as adopted by Board of Directors of Panhandle on March 19, 1945.

**Service Company:**

No. 1—Map showing gas facilities of Service Company.

No. 2—Statement showing gas utility statistics of Service Company.

No. 3—Statement showing gas utility net operating income and pro forma operating income of Service Company.

**Central Indiana:**

No. 1—Statement showing gas utility net operating income and pro forma operating income of Central Indiana.

**Kokomo Company:**

No. 1—Statement showing gas utility statistics of Kokomo Company.

No. 2—Statement showing gas utility net operating income and pro forma operating income of Kokomo Company.

It was agreed between the Commission and the parties to this cause, that the objections to the relevancy or materiality of the evidence, which were made by any party hereto and were not acted on by the Commission at the time made, should be argued in briefs to be filed, and in oral argument; and should thereafter be ruled upon by the Commission.

Following the hearing on March 28, 1945, briefs and reply briefs were filed by the Public Counsellor, intervenors and Panhandle. On October 3, 1945, this Commission heard oral arguments in this cause, at which time additional briefs were presented by Central Gas and by Panhandle.

The Commission is fully appreciative of the public importance of the issue here under investigation. Because of this fact, it has been anxious throughout these proceedings to afford the interested parties ample opportunity to present fully to the Commission their re-

spective views upon the matters involved. It has sought, too, such full factual information as would shed light upon any phase of the regulatory problem which the Commission has before it in this investigation. The fundamental issues involved are not narrow ones and the Commission feels that it has a better background for dealing with the public issues here at stake if it has before it the full history of the development of the natural gas utility business in Indiana, of the place of Panhandle and its predecessors in that development, of the activities that Panhandle is carrying on or may be endeavoring to carry on, and of the possible effect of such activities upon the effectiveness of regulation of direct consumer sales in Indiana and upon the interest of the gas consuming public in Indiana. The Commission believes that all of the evidence adduced in this cause directly sheds light upon such matters.

Prior to this investigation, the Commission had never been supplied with information as to the activities of Panhandle within the state. When the supplying of direct consumer gas service was commenced by Panhandle in Indiana it did not file, and has at no time since filed, with the Commission any reports, tariffs or regulations. The evidence in this investigation supplies in part such information as the Commission would normally have from required reports. In an investigation of this kind—an investigation by a regulatory agency on its own motion and for purposes of determining its regulatory duties—no narrow conception of the restriction of factual information should be adopted. The

Commission concludes, therefore, that all the evidence presented in this cause should be received by it as a part of the record in this cause, and that each and all of the objections of Panhandle to the relevancy or materiality of any evidence offered should be overruled: and it will be so ordered.

## FINDINGS OF FACTS

The Commission, having heard and considered the evidence presented in this cause and being duly advised in the premises finds that the evidence in this cause establishes facts which are summarized and found as follows:

1. Panhandle, a Delaware corporation, at and prior to sometime in the year 1931, had constructed its main transmission line extending from the Amarillo Gas Field in the Texas Panhandle and the Hugoton Gas Field in southwestern Kansas through the States of Oklahoma, Kansas, Missouri and Illinois, to a point near the Indiana-Illinois state line. In 1932 the eastern end of this line was interconnected near Dana, Indiana, with gas transmission lines built by Indiana Gas Transmission Corporation (Indiana Transmission), a Delaware corporation, extending to Zionsville, Indiana, and to Muncie, Indiana. Near Muncie, said line interconnected with gas transmission lines from Ohio owned and operated by Ohio Fuel Gas Company (Ohio Fuel), an Ohio corporation. Early in 1936, Indiana Transmission was merged into Michigan Gas Transmission Corporation (Michigan Gas), a Delaware corporation, and the line to Zionsville was extended

eastward across Indiana, the northwest corner of Ohio, and Michigan to a point near Detroit, Michigan. Indiana Transmission, Michigan Gas and Ohio Fuel were all subsidiaries of Columbia Gas & Electric Corporation (Columbia Gas), a Delaware corporation, or its affiliates. The relationship of Columbia Gas and its affiliates and Panhandle are set forth in Findings made and an Opinion given by the Securities and Exchange Commission on May 27, 1941, in Files numbered 31-106, 31-107, 31-108, 31-109, 31-422, 31-423 and 31-493 pending before it, which Findings and Opinion are a part of the record in this cause as "Exhibit D" in the Stipulated Facts. On February 6, 1942 Panhandle acquired from Columbia Gas or subsidiaries all the stock of Michigan Gas and the gas facilities in Indiana of Ohio Fuel. On March 31, 1943, Panhandle liquidated Michigan Gas and acquired directly all its properties. Said line and appurtenant facilities as presently constituted, consist of 22-inch, 24-inch and 26-inch transmission mains, branch lines, dehydration plants, gasoline plant, compressor stations and related facilities incidental to the transmission and delivery of such natural gas. As a result of the completion of Panhandle's 1943 construction program, an additional continuous parallel main runs from a point near Liberal, Kansas, to a point 68.8 miles northeast of Zionsville, Indiana, and from a point near Edgerton, Indiana, to a point in Ohio 18.2 miles northeast of Edgerton. The details of the development of this gas transmission system, and the operation thereof, is shown by Stipulated Facts and particularly in Section VI, Paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10 thereof and the supporting exhibits therein referred to and

made a part thereof as "Exhibits A to H-3," both inclusive. The gas fields and the transmission system are shown more fully on the map, which is a part of the Stipulated Facts as "Exhibit C."

2. Said gas transmission line and other facilities were constructed, or acquired, for the purpose of transporting natural gas from the said gas fields in Texas and Kansas to the intervening States, including the State of Indiana, and the Detroit area and selling such gas directly or indirectly to the public; and Panhandle is now engaged, and it, or the related Columbia Gas Subsidiaries, have continuously since such construction and acquisition, been engaged in the business of furnishing such natural gas in the State of Indiana and elsewhere, directly or indirectly, to all types of consumers, residential, commercial and industrial. At the present time, Panhandle holds a Certificate of Admission, issued to it on September 19, 1935, by the Secretary of State for Indiana, authorizing it to transact business in the State of Indiana as a foreign corporation, which recites that the character of business, under its Articles of Incorporation, which it is authorized to transact in Indiana, is as follows:

"To engage in the business of transmitting and transporting natural gas, artificial gas, mixtures of natural and artificial gases, oil and any by-product thereof, in, into, through and from the State of Indiana and any other state except the State of Delaware, and of supplying gas and other of said articles so transmitted and transported by it to other corporations, public or private or persons, firms, associations or other organizations, en-

gaged in the business of supplying gas or other of said articles to the public.

"To lay, construct, purchase, lease or otherwise acquire, hold, own, improve, maintain and operate, pipe lines and mains for the transmission and transportation of gas and said other articles as aforesaid, and to sell, lease or otherwise dispose of the same.

"To produce or purchase or otherwise acquire, store and transmit such gas, and said other articles, and to sell or otherwise dispose of the same to corporations, persons, firms, associations or other organizations as aforesaid.

"To purchase, lease, take, in exchange, or acquire in any other manner now or hereafter authorized by law, hold, possess, improve, construct, develop, deal in and sell, convey, assign or otherwise dispose of any and all property of every kind and description, real, personal or mixed, necessary, convenient or suitable for the purposes of the Corporation, including, without limiting the foregoing, any and all rights of way, easements, interests, franchises, licenses and privileges in the same; provided, however, that the Corporation shall not acquire, own, hold or lease real estate in the State of Indiana except such as may be necessary for the proper carrying on of its legitimate business."

At the end of the above there appears the following declaration, which the Commission judicially knows was copied from the application for admission made by Panhandle:

"The business above described being for the purpose of interstate commerce only and not that of a public utility business in Indiana." (See "Exhibit B" attached to the Stipulated Facts.)

3. Panhandle sells and delivers in Indiana the natural gas transported by it (1) to other gas companies, including all of the intervenors except Southern Indiana, which purchasers distribute such gas to residential, commercial and industrial consumers served by them, and (2) to one industrial consumer, Anchor-Hocking Glass Corporation (Anchor-Hocking), served directly by Panhandle.

4. Prior to January 9, 1945 Panhandle filed with the Federal Power Commission its application under the Natural Gas Act for a certificate of convenience and necessity to construct in Indiana, as a part of its "general pipe line system", a 3-inch lateral line extending from one of its main lines to a point near the Town of Fortville, Indiana, and certain facilities, which line and facilities were to be used to transport in inter-state commerce, and to deliver, gas to be sold to two Indiana utilities for resale, and also, if a proposed contract with the E. I. DuPont de Nemours (DuPont) was consummated, to be sold directly to DuPont for consumption at its plant adjacent to said town. Subsequently to the filing of said application, but prior to January 9, 1945, said contract between DuPont and Panhandle was entered into. On June 5, 1945, after hearings, the Federal Power Commission entered its order on said application in which it granted a certificate to Panhandle to construct the proposed line, but specifically prohibited Panhandle from using the

line for "either the transportation or sale of natural gas, subject to the jurisdiction of" the Federal Power Commission, "to any new customers except upon specific authorization" by said commission. Under date of June 29, 1945 Panhandle filed with the Federal Power Commission an application for a modification, without hearing, of the aforesaid provisions of said order so as to permit the use of said line for the transportation of gas to be sold to DuPont, and the construction of certain additional facilities for such delivery and in said application represented that it had received authority from the war production board to supply gas to DuPont and that delay in such gas supply would hold up peak production of war supplies. On July 7, 1945 the Public Counsellor, and on July 9, 1945 this Commission, protested against the modification of the Order of June 5, 1945 prior to a showing that state laws had been complied with. The Federal Power Commission, on July 10, 1945 and without a hearing, modified its Order of June 5, 1945, so as "to permit such service and operation as" were thereafter in such order of modification "ordered and conditioned". Said order then provided:

"(A) The certificate of public convenience and necessity issued by the Commission's order of June 5, 1945, in these matters be and it is hereby modified to authorize Panhandle Eastern's transportation and service of natural gas to Du Pont, subject to the jurisdiction of the Commission as described in the record of this proceeding.

"(B) This order is without prejudice to the authority of the Indiana Commission in the

exercise of any jurisdiction which it may have over the sale or service proposed to be rendered by Panhandle Eastern to Du Pont.

"(C) Panhandle Eastern shall report to the Commission promptly in writing, under oath, the date of the commencement of the deliveries of natural gas to Du Pont.

"(D) Except as herein modified, the provisions of the Commission's order of June 5, 1945, in these matters, including all conditions, shall remain in full force and effect."

On August 30, 1945, the Federal Power Commission issued to Panhandle in Docket No. G-607 a certificate of convenience and necessity authorizing it "to construct and operate facilities for the transportation and sale for resale of natural gas in interstate commerce, to the extent and subject to the terms and conditions specified in said order and certificate." Panhandle asserts, as of October 3, 1945, that the facilities were constructed but that DuPont was not yet ready to take gas. So far as the Commission is advised Panhandle has not since said date supplied any gas to DuPont in Indiana. (See Section VI, Paragraph 12 of the Stipulated Facts and "Exhibit J-1" and "Exhibit J-2" filed therewith, and the Supplemental Stipulation of Facts and all exhibits filed therewith). Panhandle has not yet applied to this Commission for any Necessity Certificate authorizing it to render gas service direct to consumers within the rural area in which the plant of DuPont is located. Panhandle plans to sell all industrial customers within reach

of its facilities in Indiana who meet Panhandle's requirements.

5. Panhandle does not directly sell in Indiana any gas to residential and commercial consumers, except that it does supply for a moderate charge gas for residential use to seven of its employees, who live in company owned houses located on Panhandle's property. As part of its obligation under certain right of way agreements in other States and similar arrangements with its own employees, Panhandle, throughout its entire system, is now rendering service to approximately 194 residential customers and the revenue therefrom for the year ended December 31, 1943, amounted to $12,220.49. During the same year, revenue from direct industrial sales for the entire system amounted to $1,559,195.24 and revenue from sales to other gas companies for resale amounted to $22,072,005.40. Current sales are being made in approximately the same proportions.

6. Approximately 950,000 consumers are supplied directly or indirectly with gas from the Panhandle system, including more than 112,000 consumers in Indiana. The number of industrial consumers served directly by Panhandle in the entire system was 21 in 1943, and is 23 at the present time. The names of such consumers, the location of their plants at which natural gas is supplied by Panhandle and the years in which direct service of natural gas by Panhandle to such plants commenced are given in a table, which is shown on page 12 and forms a part of Section VI, Paragraph 13 of the Stipulated Facts.

7. For the 12 months period ending September 30, 1944, the amounts in thousands of cubic feet (M. C. F.) of gas purchased by the intervenors from Panhandle and resold by them to industrial consumers and the revenue derived by the intervenors therefrom were as follows:

| Company | M. C. F. Sales | Revenue |
|---|---|---|
| Central Gas ..... | 9,004,962 | $2,624,557.81 |
| Kokomo Company ... | 480,406 | 196,241.70 |
| Northern Company... | 940,340 | 545,940.00 |
| Service Company .... | 1,978,605 | 812,631.80 |

8. Anchor-Hocking is engaged in its plant at Winchester, Indiana, in the manufacture of glassware and the natural gas purchased from Panhandle for use at the Winchester plant of Anchor-Hocking is used in the manufacture of products produced there. (See Section VI, Paragraph 14 of the Stipulated Facts.)

9. Central Gas serves natural gas purchased by it from Panhandle to more than 30 large industrial consumers which is delivered to them by Central Gas and used by them in their manufacturing plants in Indiana. Said industrial consumers include Hart Glass Division of Armstrong Cork Company, Ball Brothers Company, Foster-Forbes Glass Company, Owens-Illinois Glass Company, Slick Glass Corporation, Sneath Glass Company, The Warfield Company, Sterling Glass Division, Delco-Remy Division of General Motors Corporation, Indiana Steel and Wire Company, Johns-Manville Products Corporation, The National Tile Company and Warner Gear Company. (See Section VI, Paragraph 15 of the Stipulated Facts.)

10. Service Company serves natural gas purchased by it from Panhandle to 9 large industrial consumers in Indiana, which is used by them in their manufacturing plants in Indiana. Said industrial consumers include Aluminum Company of America, Chrysler Corporation, Ingersoll Steel and Disc Division of Borg-Warner Corporation and Ingram Richardson Company. (See Section VI, Paragraph 16 of the Stipulated Facts.)

11. Kokomo Company serves natural gas purchased by it from Panhandle to 6 large industrial consumers in Indiana, which is used by them in their manufacturing plants there. Said industrial consumers are Continental Steel Corporation, American Radiator and Standard Sanitary Corporation, Haynes-Stellite Company, Kingston Products Corporation, Chrysler Corporation and Globe Stove and Range Company. (See Section VI, Paragraph 17 of the Stipulated Facts.)

12. Northern Company serves natural gas purchased by it from Panhandle to 72 large industrial consumers in Indiana, which is used by them in their manufacturing plants there. Said industrial consumers include General Electric Company, International Harvester Company, Studebaker Corporation and Phelps-Dodge Corporation. (See Section VI, Paragraph 18 of the Stipulated Facts.)

13. Panhandle, in Indiana, sells natural gas to Kentucky Natural Gas Corporation, which company resells all or the principal part of such natural gas to companies distributing, as public utilities, natural gas to residential, commercial and industrial consumers in Indiana. Panhandle, in Indiana, also

sells natural gas to the following companies or municipal corporations, which are public utilities or municipalities distributing such gas and the number and classification of gas consumers served by such gas from Panhandle are approximately, as follows:

| Name of Company | Approximate Number of Customers Served: Residential | Commercial | Industrial | Other | Total |
|---|---|---|---|---|---|
| Central Gas | 31,384 | 1,322 | 103 | none | 32,809 |
| Greenfield Gas | 1,296 | 59 | 2 | 4 | 1,361 |
| Indiana Gas Distribution Corp. (Indiana Gas) | ..... | ..... | ..... | ..... | 2,070 |
| Indiana-Ohio Public Service Co. (Ind.-Ohio Co.) | 3,314 | 219 | 11 | ..... | 3,544 |
| Kokomo Company | 6,674 | 379 | 23 | ..... | 7,076 |
| Lynn Natural Gas Company | 265 | 28 | ..... | ..... | 293 |
| Northern Company (Ft. Wayne District) | 31,633 | 1,160 | 67 | 68 | 32,928 |
| Pendleton Natural Gas Company | 617 | 39 | ..... | ..... | 656 |
| Service Company | 22,516 | 1,916 | 46 | 120 | 24,598 |
| Richmond Service Company | ..... | ..... | ..... | ..... | 6,800 |
| Town of Lapel | ..... | ..... | ..... | ..... | 250 |
| Town of Montezuma | ..... | ..... | ..... | ..... | 100 |
| Town of Pittsboro | ..... | ..... | ..... | ..... | 116 |
| Town of Roachdale | ..... | ..... | ..... | ..... | 92 |
| Total | 97,699 | 5,122 | 252 | 192 | 112,699 |

(See Section VI, Paragraph 19 of Stipulated Facts.)

14. Deliveries of natural gas by Panhandle directly to industrial customers using large quantities of gas, and to other gas companies for resale to industrial customers using large quantities of gas, are, in most instances, subject to curtailment, interruption or discontinuance in the event of an insufficiency in the supply of gas.

15. The details of the service of natural gas to Anchor-Hocking since 1931, when it first commenced the extensive use of natural gas as a fuel at its plant at Winchester, Indiana, will be found in Section VI, Paragraph 21 of the Stipulated Facts and the supporting Exhibits mentioned therein, being "Exhibit G-6," "Exhibit K," "Exhibit L," and "Exhibit M," "Exhibit N-1," "Exhibit N-2" and "Exhibit N-3." Briefly summarized, from 1931 until May 11, 1942, Anchor-Hocking received this service from Indiana Gas, a public utility under the Indiana Act, which, in turn, purchased the gas from Panhandle or its predecessor, Michigan Gas, and this service was taken over by Panhandle under its contract dated May 11, 1942, copy of which is attached to the Stipulated Facts as "Exhibit N-2."

16. In the service of such natural gas directly to Anchor-Hocking, Panhandle transports the gas through a 6-inch lateral or branch gas transmission line ("Winchester line") extending north from Panhandle's main line a distance of about 7 miles, which Winchester line was constructed early in 1931. The pressure in the said main line, which is a 16-inch line running from a point near Muncie to a point in Ohio near the Indiana-Ohio State Line,

is normally carried at approximately 200 pounds per square inch. At or adjacent to a point where the natural gas is taken into the Winchester line from said 16-inch line, the pressure is reduced by means of a regulator, owned and operated by Panhandle, to approximately 100 pounds per square inch and the gas in the Winchester line is sold by Panhandle (1) to Anchor-Hocking for its own use and (2) to Indiana-Ohio Company for resale to consumers in Winchester, Portland and Union City in Indiana, and Union City in Ohio, and their environs. Adjacent to the northeast corner of the corporate limits of Winchester, Indiana, Panhandle has two meter houses located approximately 400 feet apart, both of which are located on plant property of Anchor-Hocking. In one of these are the regulators and meters used in connection with deliveries to Anchor-Hocking and in the other, regulators and meters used in connection with deliveries to the Indiana-Ohio Company. A branch of the Winchester line runs directly into each of these meter houses and gas enters both at the same pressure, which is normally about 80 pounds per square inch. At the Anchor-Hocking meter house, the gas passes first through a regulator which reduces the pressure to approximately 40 pounds per square inch, then through two orifice meters into a header. From this header a four-inch service line carries the gas to the plant at the metering pressure (40 pounds per square inch). From this header gas also passes into another regulator in the meter house which reduces the gas to a pressure of approximately 10 pounds per square inch. From this regulator the gas at such pressure passes through a ten inch line directly

into the glass plant. Anchor-Hocking takes delivery of all gas at the outlet side of Panhandle's meter house. In 1943, Panhandle sold 1,150,279 M. C. F. of natural gas to Anchor-Hocking and 151,065 M. C. F. of natural gas to Indiana-Ohio Company. The Winchester line is located in part on certain public county highways in Randolph County pursuant to authority granted by the Board of Commissioners of said County to Ohio Fuel Gas Company, which built the line originally before it was acquired by Panhandle on February 6, 1942. (See Section VI, Paragraphs 22, 23, 24, 25, 26 and 27 of the Stipulated Facts.)

17. Except as above shown, no franchise authorizing the sale or delivery of natural gas under the contract between Panhandle and Anchor-Hocking dated May 11, 1942, which is attached to the Stipulated Facts as "Exhibit N-1," has been acquired by Panhandle from the State of Indiana or any agency thereof, or is claimed by Panhandle to have been so acquired. (See Section VI, Paragraph 28 of the Stipulated Facts.) Panhandle has not filed with the Public Service Commission of Indiana any tariffs of rates or any rules or regulations relating to the sale of natural gas to Anchor-Hocking; and Panhandle has at no time filed with the Public Service Commission of Indiana any annual report or any other periodic report, nor has it filed any original cost report appertaining to any portion of its property in Indiana. Panhandle has not purported to keep its books, accounts, papers or records in the manner required under the orders and directions of the Public Service Commission of Indiana for public utilities subject to the jurisdiction thereof.

In keeping its books, accounts, papers and records Panhandle is subject to the rules and regulations of the Federal Power Commission, but Panhandle claims that direct sales by it to industrial consumers are not subject to regulation by the Federal Power Commission. (See Section VI, Paragraphs 30, 31, 32, 33 and 34 of the Stipulated Facts.)

18. Each of the intervenors in this Cause has filed with the Public Service Commission of Indiana, sworn annual reports for the years 1942 and 1943, as provided for by the Public Service Commission Act of the State of Indiana.

19. After an exchange of letters between Panhandle and Kokomo Company in June 1943, the preliminary arrangements for such a meeting being made on June 30, 1943, certain representatives of Panhandle and of Kokomo Company had a meeting with Mr. Williams and Mr. Clifford of Continental Steel Corporation, one of the large industrial consumers being served by Kokomo Company with gas being purchased by it from Panhandle. In the course of this conference, Mr. Morton, one of the representatives of Panhandle, reiterated what he had already stated on the day previous to Mr. Hahn of Kokomo Company, namely, that it would be the purpose and intention of Panhandle in the future to make all contracts for supplying gas to large industrial consumers direct with such consumers and that Panhandle hoped to make such arrangements with Continental Steel Corporation. (See Section 14 of the Stipulation of Evidence.)

20. On the afternoon of June 30, 1943, Messrs. Morton and Ballard, representing Panhandle also,

called on certain representatives of Service Company in connection with the matter of a supply of natural gas for the Ingersoll Steel and Disc Division of the Borg Warner Corporation (Ingersoll Company), a large industrial consumer at New Castle, Indiana, then being supplied by Service Company under an interruptible gas contract with gas obtained from Panhandle. Mr. Morton stated that the Federal Power Commission had previously ruled that direct sales of gas to consumers of pipe line companies were not subject to regulations by such Commission; that Panhandle desired to sell as much industrial load direct to industries as possible in order to remove this segment of its business from the jurisdiction of such Commission; that Panhandle proposed to sell direct to the industrial consumers at the points of inter-connection between the facilities of Panhandle and the existing distributing utilities whose facilities would be utilized to transmit the natural gas for the account of the industrial consumers; that present plans of Panhandle contemplated limiting the size of interruptible industrial consumers that Panhandle desired to serve direct to such consumers as had a monthly consumption of about 10,000,000 or more cubic feet of gas. On the following day, Messrs. Morton and Ballard of Panhandle again stated to representatives of the Ingersoll Company that Panhandle intended to serve natural gas direct to their plant, and likewise intended to serve direct all other large industrial consumers up and down the pipe line of Panhandle; and under date of July 19, 1943, Panhandle forwarded to Service Company for acceptance, an extension of the Ingersoll Supply Con-

tract which provided for termination by either party on 60 days written notice, and on July 29, 1943, Service Company accepted such extension agreement and on the following day entered into a supplemental agreement with the Ingersoll Company fixing a like termination period. This latter agreement was filed with and approved by the Public Service Commission of Indiana. (See Sections 15, 16 and 17 of the Stipulation of Evidence.)

21. (a) Early in 1941, Panhandle and Central Gas carried on certain negotiations with reference to the terms and provisions of a new gas supply contract and on or about July 31, 1941, both companies executed and delivered a new supply contract (See "Exhibit L" of the Stipulation of Evidence). Panhandle subsequently informed Central Gas that its Board of Directors refused to approve said contract although the signature clause indicated that the officers of Panhandle, who had signed the same in its behalf, acted with authority. This refusal of approval was based upon the fact that the contract, in effect, would prohibit Panhandle from undertaking direct service to industrial customers in the area being served by Central Gas. Numerous conferences were held between representatives of Panhandle and Central Gas with reference to this matter during the remainder of 1941 and prior to August 4, 1942, on which latter day Central Gas directed to the Federal Power Commission for filing under the Natural Gas Act, a Petition, which is included in the Stipulation of Evidence as "Exhibit K."

(b) Thereafter, while said Petition, "Exhibit

34

K," was pending, Panhandle filed with the Federal Power Commission its notice of cancellation or termination dated May 18, 1943, which is attached to the Stipulation of Evidence and included therein as "Exhibit L," and which was in the words and figures following, to-wit:

"NOTICE OF CANCELLATION OR TERMINATION

Federal Power Commission

Washington, D. C.

Gentlemen:

"Notice is hereby given that the following identified rate schedules filed with the Federal Power Commission by Michigan Gas Transmission Corporation (now Panhandle Eastern Pipe Line Company) are proposed to be cancelled on the dates respectively set forth opposite the description of each of said schedules:

| PEPL Co. Rate Schedule RPC Number | Name of Ultimate Industrial Customer | Date of Contract | Date of Proposed Term'n |
|---|---|---|---|
| 76 | Guide Lamp Division of Gen. Motors Corp. | 9/12/40 | 7/19/43 |
| 72 | Sterling Glass Co. | 7/ 8/40 | 8/ 3/43 |
| Supp. 15 to 71 | Slick Glass Co. | 2/16/40 | 7/19/43 |
| 74 | Owens-Illinois Glass Co. | 5/27/41 | 7/19/43 |
| Supp. 17 to 71 | Foster-Forbes Glass Co. | 10/31/40 | 8/ 3/43 |
| Supp. 6 to 71 | Aladdin Industries | 10/ 5/38 | 7/19/43 |
| Supp. 7 to 71 | Sneath Glass Co. | 10/ 5/38 | 7/19/43 |
| Supp. 14 to 71 | Hart Glass Div. of Armstrong Cork Co. | 11/13/39 | 7/19/43 |
| Supp. 5 to 71 | Indiana Glass Co. | 9/27/38 | 7/19/43 |
| Supp. 13 to 71 | Ball Brothers | 11/ 1/39 | 7/19/43 |
| Supp. 16 to 71 | Banner Rock Div. of Johns-Manville Corp. | 8/20/40 | 7/19/43 |
| Supp. 11 to 71 | General Insulating Co. | 10/20/38 | 7/19/43 |
| 29 | Banner Rock Div. of Johns-Manville Corp. | 5/ 5/41 | 7/19/43 |
| 28 | Eaton Canning Co. | 5/ 5/41 | 7/19/43 |

"The aforementioned Michigan Gas Transmission Corporation rate schedules numbers 28 and 29 are so designated for the reason that Panhandle Eastern Pipe Line Company has not been advised that new Panhandle Eastern Pipe Line Company schedule numbers have been assigned thereto.

"The above notice was served on Central Indiana Gas Company by depositing a copy thereof in the United States mail, addressed to Central Indiana Gas Company at Muncie, Indiana, on the eighteenth day of May, 1943.

"No negotiations are presently in progress for a continuance of the service to the customers covered by the said rate schedules, however, it is the intention of Panhandle Eastern Pipe Line Company to negotiate with said several industrial customers for a continuation of the service directly by Panhandle Eastern Pipe Line Company. Also, it is the intention of Panhandle Eastern Pipe Line Company to negotiate with Central Indiana Gas Company for the purpose of effecting necessary arrangements for the delivery of gas by Central Indiana Gas Company to each of said customers for the account of Panhandle Eastern Pipe Line Company.

"Panhandle Eastern Pipe Line Company is not advised whether Central Indiana Gas Company

approves or disapproves of the cancellation and termination of said several rate schedules.

Yours very truly,

PANHANDLE EASTERN PIPE LINE COMPANY

By C. Buddrus
President

Dated this 18th day of May, 1943, at Kansas City, Missouri."

(c) Thereafter, on June 3, 1943, representatives of Central Gas conferred with the Chairman of the Board and President, respectively, of Panhandle with respect to Panhandle's official declaration of intention to render direct gas utility service, contained in the above Notice of Cancellation, and at that conference, the representatives of Panhandle stated that Panhandle was interested in serving directly certain industrial customers of Central Gas but on some basis which would make such direct sales by Panhandle outside of the jurisdiction of the Federal Power Commission under the Natural Gas Act; that Panhandle was anxious to take over such business because it was an unregulated transaction both as to the Federal Power Commission and the Public Service Commission of Indiana, and that it intended to establish higher industrial rates based on a competitive fuel basis. On or about June 11, 1943, at another conference between representatives of Panhandle and Central Gas, the representatives of Panhandle again stated, in sub-

stance, that Panhandle intended to take over direct service to certain of the large industrial customers of Central Gas and any negotiations would have to be with that eventuality in mind.

(d) On August 9, 1943, Central Gas addressed a letter to Federal Power Commission with reference to the Notice of Cancellation dated May 18, 1943, filed by Panhandle with that body which said letter contained, in part, the following:

"It is the declared policy and intention of Panhandle Eastern Pipeline Company to abandon service to Central Indiana Gas Company for resale to these industrial consumers, and to try to take over and serve directly these industrial consumers so that the rates to be charged therefor will be beyond the regulatory control of the Federal Power Commission. Since it is patently impossible, as shown by the attached map, for Panhandle Eastern Pipeline Company now to serve these industrial consumers except by means of the facilities of Central Indiana Gas Company and since, as stated by Panhandle Eastern Pipeline Company in its notice of cancellation, it intends to continue service for these industrial consumers, we do not see that there is any alternative for Central Indiana Gas Company but to disapprove and oppose vigorously the proposed cancellation. It is clear that the present and future public convenience and necessity will not permit such proposed abandonment. Further, it is noteworthy that the underlying purpose of such proposed abandonment is to try to effect a technical or paper rearrangement of this sale to

Central Indiana Gas Company for resale to industrial consumers, so that it will have the appearance of a direct sale and hence be at rates not subject to the jurisdiction of the Federal Power Commission."

(e) Under date of September 1, 1943, Panhandle addressed a letter to the Federal Power Commission and sent a copy thereof to Central Gas, which was in the following words and figures, to-wit:

"September 1, 1943

Federal Power Commission

Washington, D. C.

Attention: Leon M. Fuquay, Secretary

Re: Docket No. G-495

Dear Sirs:

"This letter is with reference to the letter of Central Indiana Gas Company to you, dated August 9, 1943, protesting our notice of cancellation, dated May 18, 1943, of contracts with Central Indiana Gas Company for its gas requirements for resale to fourteen of its industrial customers.

"We have not concluded negotiations with certain other war industries, not presently served by us, which would require volumes of gas equal to those volumes required by Central Indiana Gas Company to serve said fourteen industrial customers. Moreover, because of the shortage and the conservation of critical materials, we are unable at this time to obtain the necessary facili-

ties to render direct service to any of the industries named in our notice of cancellation.

"Without altering our policy to any extent whatsoever with respect to this matter, but for the reasons above stated, we hereby withdraw said notice of cancellation, dated May 18, 1943, as amended and extended by our letters to Federal Power Commission, dated June 14, 1943, and July 23, 1943, without prejudice to our right of again filing a similar notice of cancellation, which we intend to do, at such time as it may appear to us to be desirable.

Very truly yours,

President

cc: Central Indiana Gas Company"

(f) On October 22, 1943, Central Gas addressed a letter to the Federal Power Commission with reference to the same matter, which was in the words and figures following:

"October 22, 1943

Federal Power Commission

Washington, D. C.

Attention: Office of the Secretary

Dear Sirs:

"We have received, presumably from Panhandle Eastern Pipeline Company, an unsigned copy of letter dated September 1, 1943, addressed to the Federal Power Commission and referring to *Docket No. G-495.*

"That letter withdraws the notice of cancella-

tion by Panhandle Eastern Pipeline Company to the Federal Power Commission, dated May 18, 1943, as amended and extended, relating to certain rate schedules therein described for natural gas service to Central Indiana Gas Company for resale to industrial consumers. Since our letter to you dated August 9, 1943, disapproving and opposing the proposed cancellation was in the nature of a protest responsive to the notice of cancellation, we should like to advise that in view of the withdrawal of that notice of cancellation, the Commission may consider that the purpose of our protest has been effectuated. Accordingly, we are pleased to have the Commission consider our protest as withdrawn. Since there appears a statement in the letter of withdrawal by Panhandle Eastern Pipeline Company that they intend at some future time to file again a similar notice of cancellation, our withdrawal is necessarily without prejudice to our rights of filing again a protest or taking any other action which may be necessary or desirable to assure compliance by Panhandle Eastern Pipeline Company with the requirements of the Natural Gas Act.

Very truly yours,

CENTRAL INDIANA GAS COMPANY

By Guy T. Henry
President."

(See Sections 18, 19, 20, 21, 22, 23, 24, 25 and 26 of the Stipulation of Evidence and the supporting Exhibits referred to therein, respectively.)

22. A compilation taken from the annual reports of the gas public utilities operating in Indiana under the jurisdiction of the Public Service Commission for the year 1943 shows that the book cost of gas plant (undepreciated), exclusive of common property used in other branches of the utilities business, is in excess of $85,000,000; that the total gas consumption in thousands of cubic feet was 48,356,978.5 and that the total gross revenues derived from such sales of gas amounted to $26,301,204.14. It also showed that of the total consumption above mentioned in thousands of cubic feet, industrial sales amounted to 30,323,524.8, or 62.71% of the total; and that of the gross revenues above mentioned, sales to industry produced $10,078,079.84, or 38.32% of the total. It also showed that the total number of consumers was 451,934 of whom 432,748, or 95.75%, were domestic consumers, 17,010, or 3.76%, were commercial and 1,242, or .028%, were industrial consumers (See Public Counsellor's Exhibit No. 1).

23. Oscar W. Morton, a Rate Engineer of Panhandle, testified before the Federal Power Commission on February 26, 1945, substantially as follows: Panhandle would not willingly sell and deliver gas at Fortville, Indiana, for resale to the Dupont plant because they want to make as much money as they can out of that business and they can make more money selling gas directly than by selling it to someone, who, in turn, resells it and thus brings the transaction under the jurisdiction of the Federal Power Commission. If any other industrial plants than Dupont show an interest in obtaining gas, they would want to serve them

directly rather than serve them through the local distributing companies. It is the declared policy of Panhandle to secure as much of the load as direct as possible (See Public's Exhibit No. 2 and the testimony of Mr. Morton copied therefrom).

24. The development of its gas business in anything like its present proportion by Service Company has taken place almost wholly since natural gas was brought into Indiana by Panhandle, as hereinabove recited. This fact is illustrated by Service Company's Exhibit No. 1, which shows that for the year ended December 31, 1935, it had a total of gas customers of 41,245; whereas, at the year ended November 30, 1944, it had a total of such customers of 58,929 and that its average gas revenue per therm from residential customers went from $.2374 in 1935 to $.1576 for the twelve months period ended November 30, 1944 (See Service Company's "Exhibit No. 1").

25. It also appeared from Service Company's Exhibits No. 2 and 3 that if Service Company were to lose all of the gas revenues classified as industrial sales by reason of the pipe line company's furnishing the same, taking over those customers for direct service, it would mean loss in gross revenue in excess of $1,000,000 per annum based on figures for the twelve months period ending November 30, 1944, and for the same period, a loss in net operating income before provision for Federal Income Taxes of $293,730.22. And it appeared from testimony of Mr. Schiesz that in the event of that contingency happening, Service Company would only be able to dispense with less than 2%

of its gas utility plant property. If Service Company's industrial load should be lost to it by reason of the industrial customers being taken over by Panhandle for direct service, only about $100,000 of Service Company's investment in plant property could be retired and all of the remainder of its investment now devoted to gas service must be maintained and operated to serve Service Company's domestic and commercial users and the rates charged for service to the latter must necessarily be substantially increased to justify continuing the service to them (Service Company's Exhibit No. 1 and testimony of Mr. Schiesz, pages 67-70 of Transcript.)

26. The fact that the distributing companies served natural gas to all three classes of gas consumers, i. e., industrial, commercial and domestic, has made possible a high standard of service at lower rates to the consumers in each of the three classes than would have been possible if only one of the classes had been served. It has meant that the residential and commercial consumers have had the benefit of natural gas which would have been denied them unless the distributing companies' business had included service to all three classes of consumers. The installation of facilities to serve industrial consumers has made possible the development of domestic uses, including cooking and water heating, the higher B. T. U. gas for house heating and the use of gas for commercial cooking purposes by restaurants, hotels and others. All of these services under old methods were prohibitive in cost or the gas was not available in the quantities in which the customers wished to use it, due to the

inadequacy of facilities and of the supply of gas. It was through the development by the distributing companies of the industrial business that they have been able to improve materially the over-all load factor of gas purchased. This has also enabled the distributing companies to spread their fixed costs, such as interest, taxes and depreciation, which are constant in every-day operation, over a larger number of units of service, which automatically has given the benefit of that condition and fact to each of the three classes of consumers and has made possible the development of rates for service which were attractive not only to one of the three classes but to each of them; all of which has had the effect of promoting greater public interest in the area served by these distributing companies in the use of natural gas and in advancing the public welfare in those areas. (Pages 60, 61, 63, 75, 82 of Transcript.)

27. It appears from Central Gas' Exhibit No. 1 and the testimony with reference thereto of Guy T. Henry, its President (see pages 71 to 77, both inclusive, of the Transcript) that for the calendar year ended December 31, 1944, the total gross revenues from sales of gas of Central Gas amounted to $4,076,369.11; that its sale to industrial users grossed $2,677,265.74; that for the same period its net operating income, before provision for Federal Income Taxes, amounted to $683,393.58; that if Central Gas should lose all of its industrial customers by reason of their being taken over by Panhandle for direct service, it would have resulted in a loss in net revenues of $514,206.67 (see Central Gas' "Exhibit No. 1" and the supporting sched-

ules); that if Panhandle were to take over all of the industrial customers of Central Gas for direct service, Central Gas would be able to retire only about 1% or 2% of its investment in plant property and would find it necessary to maintain and continue to use all of the remainder of its plant property in continuing to furnish service to its domestic and commercial customers; that Central Gas has approximately 26 industrial customers, each of which use in excess of twenty-five million cubic feet of gas per year, and which, in the aggregate, use approximately nine billion feet of gas per year and from which Central Gas obtains gross revenues of approximately two and one-half million dollars; that the 14 customers mentioned in Exhibit L to the Stipulation of Facts, being the Notice of Cancellation filed by Panhandle with the Federal Power Commission under date of May 18, 1943, were among such 26 industrial customers using approximately 90% of all of the gas sold by Central Gas to industrial customers; and that if Panhandle should take over this industrial business of Central Gas and serve the customers directly, it would certainly result in a substantial increase in the present rates of Central Gas to its domestic and commercial customers in order to enable it to continue to carry on its business and to pay a return on its investment.

28. It appears from Kokomo Company's Exhibit No. 1 and the testimony of its President and General Manager, Mr. Hahn, with reference thereto, that for the 12 months period ending December 31, 1944, its total gross revenues amounted to $485,170.41, of which $198,630.79 was derived from in-

dustrial sales; that if these industrial sales had been eliminated that year, it would have resulted in a reduction in net operating income, before provision for Federal Income Taxes, from $128,157.86 to $21,755.78, a total loss of $106,402.08; that if the industrial business of Kokomo Company were taken over and served directly by Panhandle, the amount of plant property which Kokomo Company would be able to retire would be so slight as to be almost negligible, a matter of four or five thousand dollars; and that it would further result in a considerable revision of its present rates to domestic and commercial customers. (See Kokomo Company's "Exhibit No. 1" and "Exhibit No. 2" and the testimony with reference thereto of Mr. Hahn appearing on pages 78 to 90, both inclusive, of the Transcript.)

29. The use to which Panhandle is placing its facilities in Indiana and plans to place them in the future is shown by the following:

a. Panhandle has declared to Kokomo Company that "Panhandle desired, and was planning in the future, to make all industrial gas supply contracts" to large industrial users "direct with the industrial consumers; that some arrangement would have to be worked out whereby the interest of Kokomo Company in such gas sales would be continued, but the ultimate consumer would no longer be a customer of Kokomo Company, but would be a customer of Panhandle; that if Panhandle sold direct to Continental Steel Corporation, the sale would not come under the jurisdiction of the Federal Power Commission; and that

such was the chief objective of Panhandle in making such contract direct with the industrial consumers." (Stipulation of Evidence, Section 14.)

b. Panhandle solicited certain large industrial consumers of Service Company and stated to Service Company "that the Federal Power Commission had previously ruled that direct sales of gas to consumers of pipeline companies were not subject to regulation by such commission; that Panhandle desired to sell as much industrial load direct to industries as possible in order to remove this segment of its business from the jurisdiction of such commission; that Panhandle proposed to sell direct to industrial consumers at the points of inter-connection between the facilities of Panhandle and the present distributing utilities, that the facilities of the present distributing utilities would be utilized to transmit the natural gas for the account of the industrial consumers, who would reimburse the distributing utilities in an amount approximating the 20% of the rate being received by them on the sale of the interruptible natural gas; that present plans of Panhandle contemplated limiting the size of interruptible industrial consumers that Panhandle desired to serve direct to such consumers as had a monthly consumption of about 10,000,000 or more cubic feet of gas; and that he (Panhandle's representative) had been directed by Panhandle to outline the plan to the separate industrial consumers now served with interruptible gas by Service Company." Panhandle declared to Service Company and certain of its

industrial customers that Panhandle "intended to serve directly other large industrial gas consumers up and down the pipe line of Panhandle." (Stipulation of Evidence, Sections 15 and 16.)

c. Panhandle refused to make any contract with Central Gas for a supply of natural gas unless it "was based upon the policy that Panhandle should undertake at some time or other to serve directly some or all of these industrial consumers which are now being served by Central Indiana with natural gas purchased by Central Indiana Gas from Panhandle." (Stipulation of Evidence, Section 20); and Panhandle declared this policy in 1942 was the policy of the Board of Directors of Panhandle and that "its policy underlying that position, is to take over and serve directly such industrial customers which it refuses to serve through Central Gas". (Stipulation of Evidence, Section 21.)

d. The Chairman of the Board and the President of Panhandle both stated "that Panhandle was interested in securing directly certain industrial customers of Central Gas, but on some basis which would make such direct service by Panhandle outside the jurisdiction of the Federal Power Commission under the Natural Gas Act. Said Mr. W. G. McGuire (Chairman of the Board of Panhandle) stated at such conference that Panhandle was anxious to take over such business (direct sales to industrial customers) because it was an unregulated transaction both as to the Federal Power Commission and the Public Service Commission of Indiana and that

he intended to establish industrial rates on a competitive fuel basis." Said representative of Panhandle stated that "Panhandle intended to take over direct service to certain large industrial consumers of Central Gas and any negotiations would have to be with that eventuality in mind". (Stipulation of Evidence, Section 23.)

e. Panhandle seeks to sell directly any industrial plant using natural gas in quantities agreeable to Panhandle and not to sell the gas to a distributing company for resale; and declares "it is our policy to serve as much of the load as direct as possible" and that "it is their policy to obtain any place on or adjacent to their system as much direct industrial gas as they can", because Panhandle contends such business is beyond regulation by any regulatory body or agency, thus enabling Panhandle to make as much money as possible from the business. (Transcript of Cross-Examination of Oscar W. Morton, Rate Engineer for Panhandle, before Federal Power Commission on February 26, 1945, as shown at pages 44 to 46, inclusive, of Transcript of Proceedings.)

## OPINION AND CONCLUSIONS

This investigation presents the basic problem of whether or not this Commission has *any* regulatory jurisdiction over direct sales of natural gas to Indiana consumers when such sales are made, under the circumstances shown in this record, by the company transporting the gas into the state from outside sources. No issue is here raised as to regulation of the transportation of gas into or through the state, or of the sale of such gas in the state to other public utilities for resale for ultimate public consumption for domestic, commercial, industrial or any other use. Regulatory control of such matters has been specifically committed to the Federal Power Commission by Section 1 (b) of the Natural Gas Act.

Nor is any issue presently involved as to any specific regulatory action by the Commission over the rates or service of Panhandle in Indiana in the case of sales direct to Indiana consumers other than the requiring of the filing of tariffs and reports. The fundamental question is whether the direct consumer sales of Panhandle are subject to regulation by this Commission in any respect. If so, it is clear, and the Commission does not understand that counsel for Panhandle dispute, that the tariffs of rates, rules and regulations for such service by Panhandle should be on file with the Bureau of Tariffs of the Commission and that annual reports of Panhandle should have been filed with the Commission.

The facts establish, among other things, that indirectly, i.e. by sales for resale, Panhandle supplies gas generally for industrial use. Panhandle also, either from its main or branch lines, supplies gas directly to more than a score of consumers for industrial use, and is and has been active in seeking and securing where possible such consumers making direct purchases. The facts show its admitted intention of rendering direct service wherever large industrial customers can be obtained.

At the present time, Panhandle has direct service in Indiana to Anchor-Hocking. This direct service was commenced by Panhandle in 1942 by its taking over service to such customer from Indiana Gas, then an Indiana subsidiary of Panhandle, before Panhandle disposed of its full stock ownership in Indiana Gas.

The physical set-up under which this direct consumer sale is made should perhaps be briefly summarized here, since counsel for Panhandle rely heavily on this in asserting escape from the jurisdiction of the state.

The facts show that Panhandle brings gas into and through Indiana by means of high pressure transmission lines. The pressure in these lines vary from 250 to 600 pounds. From these main lines, extend branch or lateral lines, generally smaller in size than the main lines, and carrying gas at lower pressures than in the main line. One of these branch lines is the "Winchester line" by means of which gas is transported from a main line north (at pressures from 100 to 80 pounds per square inch) both for delivery to Anchor-Hocking and for delivery to

Indiana-Ohio Company for resale. The Winchester line was constructed in 1931, but until November 1934, when the sale of natural gas to Indiana-Ohio Company was commenced, the line was used wholly for the purpose of transporting gas sold to Indiana Gas for resale to Anchor-Hocking. Near the end of the Winchester line, that line, as presently constructed, branches, one branch leading to the meter house at the outlet side of which deliveries are made to Indiana-Ohio Company, and the other leading to the meter house at the outlet side of which deliveries are made to Anchor-Hocking. In the meter houses, among other things, pressures are reduced to those at which delivery is desired, which in the case of Anchor-Hocking is in part at 40 pounds per square inch and in part at 10 pounds per square inch. Deliveries to Indiana-Ohio Company are at pressures ranging from 25 to 9 pounds per square inch depending upon the season of the year. In both cases, all the facilities (other than the real estate) up to the pipe at the outlet side of the meter house are owned and operated by Panhandle.

These physical facts are here outlined, not because the Commission deems them of any controlling importance in the decision of this cause, but because counsel for Panhandle have stressed them in their briefs and oral argument as physical factors establishing that the supply to Anchor-Hocking is in interstate commerce, which fact they argue precludes regulatory jurisdiction by the state. For reasons to be hereafter discussed, this

Commission believes that such views of counsel are untenable and based upon a misconception of controlling principles.

Counsel for Panhandle frankly conceded in their oral argument that unless Panhandle is immune from regulatory control of the State of Indiana because of the restrictions of the commerce clause of the federal constitution, it is subject to the regulation of this state as a public utility operating within the state. They strenuously urge, however, that interstate commerce provides Panhandle immunity from regulation until Congress acts. They assert that the Natural Gas Act shows a policy on the part of Congress to have direct consumer sales of natural gas unregulated if made in interstate commerce; and that, regardless of congressional intent, the direct industrial sales of Panhandle, as interstate commerce, are beyond the pale of any regulation by this Commission because of prohibitions imposed by the interstate commerce clause of the federal constitution.

The Commission believes there can be no question but that Panhandle's operations in Indiana are subject to its jurisdiction except to such extent as constitutional limitations or federal regulation prohibit such jurisdiction. The record here makes it indisputably clear that the business of Panhandle is that of furnishing, directly and indirectly, natural gas to and for the public. In such activity, and the devotion of its facilities thereto, it is a public utility both within the general sense of that term and within the specific definition thereof in the

Public Service Commission Act. As a public utility its rates and service are subject to governmental regulation. The question is only to what extent regulation by Indiana under its act may be applied in view of the interstate movement of the gas that finally reaches the consumer; and this investigation is limited to the situation only of supplying direct to consumers.

In their briefs, counsel for Panhandle asserted that no certificate of convenience and necessity was or could be required of Panhandle in respect of its direct consumer sales because of their interstate character. From this assumption they argued that this fact showed immunity from regulation under the state act. The Commission is not here required to pass upon the assumption made that a certificate can not be required by the State, for the reason that, because of the time the Anchor-Hocking service was commenced, there are no provisions of the Indiana statute which require any certificate as a condition precedent for the service. The existence of a certificate of necessity and convenience or any other franchise grant is not, however, the basis of regulatory control of public utility service by this Commission under the Public Service Commission Act. That act was passed to safeguard the public interest in respect of public utility service. It has been specifically construed by the Supreme Court of Indiana to have such broad purpose and scope, and to be not limited to regulation of utilities to whom certificates of public convenience and necessity have been granted. *City of*

*Logansport v. Public Service Commission*, 202 Ind. 523, 177 N. E. 249 (1931).

The Commission has concluded, after its consideration of this case, that neither counsel's position as to congressional policy nor their position as to the restrictive scope of the commerce clause of the federal constitution are tenable. The reason upon which these conclusions are based will be briefly discussed.

**a. The Natural Gas Act and Congressional Policy.**

The bill for federal regulation of natural gas transportation and sale, which was the basic pattern of the final Natural Gas Act, was introduced in Congress in 1936. It was the subject of extensive public hearings in 1936 and 1937 held by committees of the House of Representatives. (Report of Hearing by House of Representatives' Subcommittee of Committee on Interstate and Foreign Commerce held April 2, 3, 7, 14 and 15, 1936; Report of Hearing by House of Representatives' Committee on Interstate and Foreign Commerce held March 24-25, 1937). The bill as originally introduced contained jurisdictional provisions (Section 1 (b)) which were from the start of the hearings the subject of much debate as to the federal jurisdiction provided for. Under the original provision "high-pressure" and "low-pressure" mains were jurisdictional determinatives. The specific provision was:

> "(b) The provisions of this Act shall apply to the transportation of natural gas in high-pressure

mains in interstate commerce and to natural-gas companies engaged in such transportation, but shall not apply to the distribution of natural gas moving locally in low-pressure mains or to facilities used for such distribution or to the production of natural gas: *Provided,* That nothing in this Act shall be construed to authorize the Commission to fix rates or charges for the sale of natural gas distributed locally in low-pressure mains or for the sale of natural gas for industrial use only."

Prior to the reporting out of the Bill by the Committee, Section 1 (b) underwent several changes. That section as sent to the House by the Committee, and as contained in the Natural Gas Act as passed, provides:

"(b) The provisions of this Act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas."

At the initial hearings, Mr. A. R. McDonald, Wisconsin Commissioner, Chairman of the Committee on Legislation of the National Association of Railroad and Utility Commissioners, presented a resolution of the association asking Congress to limit the federal rate regulation to the sale of natural gas for resale. In this

connection he pointed out that the pipe line companies were presently wholly unregulated only so far as they did not sell to the consumer but only to distributing companies, and asked that state regulation be not invaded by the legislation.

John E. Benton, Esquire, General Solicitor for the association, in discussing the association's resolution and proposed amendments, said that they were designed to make it clear that the Federal Act did not take from the states the regulation of rates on sales made direct to industrial customers. He said that the request of the association was

> "based upon the fact that the United States Supreme Court has recognized that the distribution of gas locally to consumers either for domestic or industrial use, is a local business, and may be reached, controlled and regulated by local authorities, municipalities and states, as provided by state law, so long as Congress withholds its hand from regulation. The states can now regulate those rates to consumers until Congress enters that field and crowds the states out."

Mr. Benton further said, after a discussion of the authorities:

> "It was evidently the purpose of the one who drew the act to reserve to the State authorities the right to regulate the consumer rate, even though the consumer was an industrial user who received his supply in a high pressure main.";

and stated that his amendment was to make it clear that

the proposed federal act did not apply to any consumer receiving gas for his own consumption "in either industrial or domestic use."

The issue of whether or not sales of gas for industrial use should be and were subject to governmental regulation was specifically brought to the fore during the hearings. The subsequent action of the House Committee leaves no room for real doubt that there existed a congressional intent that industrial sales should all be subject to governmental regulation, either state or federal.

At the 1937 hearings Mr. William A. Dougherty, a New York attorney connected with three of the largest pip line companies and with other gas companies, proposed certain amendments to the Bill. The first of these was one which, he explained, was for the purpose of making it clear that no sales, direct or indirect, for industrial purposes were within the provisions of the legislation. Following this presentation, Mr. Benton asked, and was granted, leave to present written comments upon the suggested amendments. In opposing Mr. Dougherty's first suggestion and submitting his own proposed amendment for clarification of the matter, Mr. Benton, among other things, stated (Report of Hearings on March 24-25, 1937, p. 143):

> "In this connection I point out that the exemption of industrial gas, as I understand your bill, is not for the purpose of exempting industrial gas from all regulation, but for the purpose of avoiding any

possible claim that because some industrial user may be taking a very large quantity of gas, service to him, on account of its wholesale character, should be considered subject to regulation by the Federal Commission.

"Service to an industrial user is just as much a local service, and within State jurisdiction to regulate until Congress acts, as is a sale to a householder for domestic use. Until Congress occupies the field, a sale for industrial use is accordingly subject to state regulation under the rule laid down in *Pennsylvania Gas Company v. New York Public Service Commission*, above cited.

"Sales for industrial use ought not to be exempt from all regulation, for the result may very well be that unjustifiable discrimination will result, and there will be no commission to which complaint may be made. Sales for industrial uses plainly ought to be subject to regulation by the same Commission which regulates sales to other classes of consumers, so that just and reasonable rates, for the several classes of service, properly related to each other, may be established. Under the bill as drawn, all consumer sales are exempt from Federal regulation and left to State regulation. The language of the suggested amendment just proposed leaves this purpose unaffected, and makes clear that the regulation of inter-company sales is designed for the protection of the consuming public, as a part of the complete regulation of the entire utility service."

In its initial report on the Natural Gas Act, made on May 13, 1936 (74th Cong., 2d Sess., Rep. No. 2651), the

Committee pointed out that the Bill exempted from the jurisdiction of the federal commission the sale of natural gas for industrial use, the states not being deprived by the federal act of any lawful authority over the distribution and sale of natural gas locally.

In the discussion of the general purposes of the proposed act, the report states:

> "The main purpose of the bill is to provide for the regulation of the transportation and sale of natural gas in those cases in which the state regulatory bodies do not have jurisdiction. * * *
>
> "Under the decisions of the United States Supreme Court rates charged in interstate wholesale transactions may not be regulated by the states. Such transactions are defined in the bill to mean sales of natural gas for resale. The Commission is given no jurisdiction over local rates even where the natural gas moves in interstate commerce. * * *
>
> "The bill takes no authority from State Commissions and is so drawn as to be a complement, and is in no sense a usurpation, of State regulatory authority * * *. Mr. A. R. McDonald, chairman of the Committee on Legislation of the National Association of Railroad and Utility Commissioners, and Mr. John E. Benton, general solicitor of the National Association of Railroad and Utility Commissioners, appeared at the hearing before the sub-committee in support of the bill."

In its final report (75th Cong., 1st Sess., Report No. 709), made on April 28, 1937, which report was adopted

by the Senate Committee together with a recommendation that the Natural Gas Act be passed, the Committee stated:

> "This bill is substantially identical with H. R. 12680 which, as amended, was reported by the Committee on Interstate and Foreign Commerce of the Seventy-fourth Congress, second session, with a recommendation that it pass. If enacted, the present bill would for the first time provide for the regulation of natural-gas companies transporting and selling gas in interstate commerce. It confers jurisdiction on the Federal Power Commission over the transportation of natural gas in interstate commerce, and the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use. The States have, of course, for many years regulated sales of natural gas to consumers in intrastate transactions. The States have also been able to regulate sales to consumers even though such sales are in interstate commerce, such sales being considered local in character and in the absence of congressional prohibition subject to State regulation. (See *Pennsylvania Gas Company v. Public Service Commission* (1920), 252 U. S. 23). There is no intention in enacting the present legislation to disturb the States in their exercise of such jurisdiction. However, in the case of sales for resale, or so-called wholesale sales, in interstate commerce (for example, sales by producing companies to distributing companies) the legal situation is different. Such transactions have been considered to be not local in character and, even in the absence

of Congressional action, not subject to State regulation. (See *Missouri v. Kansas Gas Company*, (1924) 265 U. S. 298, and *Public Service Commission v. Attleboro Steam & Electric Company*, (1927), 273 U. S. 83). The basic purpose of the present legislation is to occupy this field in which the Supreme Court has held that the States may not act."

The report then refers to the fact that the regulation provided "takes no authority from state Commissions" but "complements" state regulatory authority, and that the states and the state commissioners' association favored the passage of the Natural Gas Act; and refers to the resolution filed by the association and the letter filed by John E. Benton, Esquire, its general counsel.

The report continues:

"Your commission believes that this legislation is highly desirable to fill the gap in regulation that now exists by reason of the lack of authority of the State Commissions."

Following the hearings the Bill, before being reported out by the Committee, was further revised to its enacted form and clearly gives the federal commission full rate and service regulatory jurisdiction over all gas sold for resale regardless of the purpose for which such gas is to be used by the consumer. The revised Bill continued the basic principle of non-interference with state regulatory jurisdiction in all direct consumer sales.

In cases arising under the Natural Gas Act the Supreme Court of the United States has had occasion to

review the legislative history of the statute and to point out the complementary nature thereof.

In *Public Utility Commission of Ohio v. United Fuel Gas Company*, 317 U. S. 456, 87 L. ed. 396 (1942), the court said, pp. 402-3:

> "It is clear, as the legislative history of the Act amply demonstrates, that Congress meant to create a comprehensive scheme of regulation which would be complementary in its operation to that of the states, without any confusion of functions. The Federal Power Commission would exercise jurisdiction over matters in interstate and foreign commerce, to the extent defined in the Act, and local matters would be left to the state regulatory bodies. Congress contemplated a harmonious, dual system of regulation of the natural gas industry—federal and state regulatory bodies operating side by side, each active in its own sphere. See H. Rep. No. 2651, 74th Cong., 2d Sess., pp. 1-3; H. Rep. No. 709, 75th Cong., 1st Sess., pp. 1-4; Sen. Rep. No. 1162, 75th Cong., 1st Sess."

And in *Federal Power Commission v. Hope Natural Gas Company*, 320 U. S. 591, 88 L. ed. 333 (1944), the court, through Mr. Justice Douglas, stated, p. 349:

> "We pointed out in *Illinois Natural Gas Co. v. Central Illinois Pub. Serv. Co.*, 314 U. S. 498, 506, 86 L. ed. 371, 376, 62 S. Ct. 384, that the purpose of the Natural Gas Act was to provide, 'through the exercise of the national power over interstate commerce, an agency for regulating the wholesale distribution to public service companies of natural gas

moving interstate, which this Court had declared to be interstate commerce not subject to certain types of state regulation.' As stated in the House Report the 'basic purpose' of this legislation was 'to occupy' the field in which such cases as *Missouri ex rel. Barrett v. Kansas Natural Gas Co.*, 265 U. S. 298, 68 L. ed. 1027, 44 S. Ct. 544, and *Public Utilities Commission v. Attleboro Steam & Electric Co.*, 273 U. S. 83, 71 L. ed. 549, 47 S. Ct. 294, had held the States might not act. H. Rep. No. 709, 75th Cong., 1st Sess., p. 2. In accomplishing that purpose the bill was designed to take 'no authority from State commissions' and was 'so drawn as to complement and in no manner usurp State regulatory authority.' Id. p. 2. And the Federal Power Commission was given no authority over the 'production or gathering of natural gas.' § 1(b).

"The primary aim of this legislation was to protect consumers against exploitation at the hands of natural gas companies. Due to the hiatus in regulation which resulted from the *Kansas Natural Gas Co.* Case and related decisions state commissions found it difficult or impossible to discover what it cost interstate pipeline companies to deliver gas within the consuming states; and thus they were thwarted in local regulation. H. Rep. No. 709, supra, p. 3. Moreover, the investigations of the Federal Trade Commission had disclosed that the majority of the pipe-line mileage in the country used to transport natural gas, together with an increasing percentage of the natural gas supply for pipe-line transportation, had been acquired by a handful of holding companies. State commissions, independent producers, and communities having or seeking

> the service were growing quite helpless against these combinations. These were the types of problems with which those participating in the hearings were preoccupied. Congress addressed itself to those specific evils."

And in his concurring opinion, Mr. Justice Jackson, referring to judicial determination of regulatory power, states, p. 370:

> "Then came issues as to state power to regulate as affected by the commerce clause. *Public Utilities Commission v. Landon*, 249 U. S. 236, 63 L. ed. 577, 39 S. Ct. 268, PUR 1919C 834 (1919); *Pennsylvania Gas Co. v. Public Serv. Commission*, 252 U. S. 23, 64 L. ed. 434, 40 S. Ct. 279, PUR 1920E 18 (1920). These questions settled, the Court again was called upon in natural gas cases to consider state rate making claimed to be invalid under the Fourteenth Amendment."

It seems to this Commission it would be patently absurd to conclude that Congress in the Natural Gas Act, which regulated service and rates in cases of natural gas sold to a distributing utility for resale to industrial consumers, announced a policy that there was such a lacking of public interest in direct sales to industrial consumers that such sales should be free from regulatory control by any governmental agency. Again and again in the legislative history is the plain assertion that the existing regulatory gap was to be filled, and that it was to be filled without encroachment on state functioning. To torture that clear purpose into

an intention that a large segment of the distribution of gas was to be uncontrolled, if the device of direct consumer sales by pipe-line companies was resorted to, would be to disregard an intent that Congress has plainly shown, and to ignore applicable principles to the end that competition in public utility service, discrimination in such service, and rates for such service to a class of users shall be uncontrolled and that the ability of the state to protect the interests of such class and the other classes of gas users would be inescapably impaired. This Commission finds no basis in the federal constitution or in the history of the legislation or in the decisions of the Supreme Court of the United States for such a conclusion as has been urged. It finds in that history, and in the decisions of that court, and in the necessities of public interest, impelling reason to reject such contention. It finds in that history a clear showing that Congress recognized that all public utility sales of natural gas should be subject to regulation, and that by the Natural Gas Act it provided regulation within the full field in which, under the federal constitution, the states were powerless to act, but carefully preserved to the states full rate and service regulatory control in all other cases.

**b. Commerce Clause of Federal Constitution, if Applicable, Would Not Prohibit State Regulation.**

But counsel insist that, regardless of any congressional view that may be shown by the Natural Gas Act, constitutional prohibitions preclude state regulation of

the sales direct to Anchor-Hocking because the sales are in interstate commerce. Much argument can be expended, pro and con, on the question whether or not the sales of gas made direct to an industrial consumer under the factual circumstances shown in this case are sales in intrastate commerce or in interstate commerce. If the answer be sought wholly or primarily in physical characteristics, and logical consistency in the application of these physical characteristics is attempted, difficulties are soon encountered in the attempt to fix the line of demarcation. After careful study of the court decisions, this Commission is of the view that there is much in the opinions of the United States Supreme Court in *Missouri ex rel. Barrett v. Kansas Natural Gas Company*, 265 U. S. 298, 68 L. ed. 1027 (1924), *East Ohio Gas Company v. Tax Commission of Ohio*, 283 U. S. 465, 75 L. ed. 1171 (1931), and *Southern Natural Gas Corporation v. Alabama*, 301 U. S. 148, 81 L. ed. 970 (1937), and in its most recent opinion on this subject, *Connecticut Light & Power Company v. Federal Power Commission*, 323 U. S. —, 89 L. ed. Adv. Op. 691 (1945), to sustain the view that the direct industrial sales made by Panhandle, in the manner and under the circumstances shown by this record, are sales in intrastate commerce rather than sales in interstate commerce. See, also, the note by Professor Thomas Reed Powell on this subject in 58 Harvard Law Review 1072 (September 1945) for a careful analysis and illuminating discussion of this problem. The lower court decisions on which counsel for Panhandle rely on this point

seem to this Commission to have overlooked the basic principles as set forth and discussed by the Supreme Court of the United States in the cases above cited. Nor does this Commission think that the recent natural-gas cases decided by that court (*Colorado Interstate Gas Company v. Federal Power Commission*, 89 L. ed. Adv. Op. 807; *Colorado-Wyoming Gas Company v. Federal Power Commission*, 89 L. ed. Adv. Op. 831; and *Detroit et al. v. Panhandle Eastern Pipe Line Company*, 89 L. ed. Adv. Op. 836) can be deemed to represent either a reversal of those principles or a determination of the character of direct sales made in the manner shown by this record. Assuming the correctness of counsel's view that the court did characterize the industrial sales referred to in those cases as interstate ones, it is apparent from the issues and opinion that no problem of the exact character of the direct industrial sales was at issue since, be they interstate or intrastate, such sales were by the express provisions of the Natural Gas Act outside the jurisdiction of the Federal Power Commission. There is nothing in the opinions to indicate that the court had presented to it, or gave any consideration to, the factual characteristics attendant to those sales or tested them on the basis of its prior decisions pertinent to this point or considered them in the light of principles shortly thereafter announced in the *Connecticut* case.

This Commission is, of course, hesitant to decide controverted legal points when such decision can be avoid-

ed, although it will not shirk such duty when necessary as a basis for determining the duties placed upon it by the legislature. Fortunately, the issues of this investigation do not turn upon the interstate or intrastate character of the sales direct to the consumer. Whether those sales be interstate or intrastate, this Commission believes it has a regulatory control thereof. In the judgment of this Commission such sales, even if deemed interstate, are subject to state regulation because the matter is one within that class where a predominate local interest admits of reasonable, non-discriminatory regulation or exercise of police power by the state until and unless Congress sees fit to assert its superior right of control.

This principle was early announced by the Supreme Court of the United States, and has been often restated and applied by it.

In the early case of *Wilson v. Blackbird Creek Marsh Co.*, 2 Peters 245, 7 L. ed. 412 (1829), the Supreme Court of the United States upheld an act of Delaware authorizing the construction of a dam across a navigable stream. Mr. Chief Justice Marshall stated, p. 414:

> "The counsel for the plaintiffs in error insist that it comes in conflict with the power of the United States 'to regulate commerce with foreign nations and among the several States.'
>
> "If Congress had passed any Act which bore upon the case; any Act in execution of the power to regulate commerce, the object of which was to

control State legislation over those small navigable creeks into which the tide flows, and which abound throughout the lower country of the Middle and Southern States, we should feel not much difficulty in saying that a State law coming in conflict with such Act would be void. But Congress has passed no such Act. The repugnancy of the law of Delaware to the Constitution is placed entirely on its repugnancy to the power to regulate commerce with foreign nations and among the several States; a power which has not been so exercised as to affect the question.

"We do not think that the Act empowering the Black Bird Creek Marsh Company to place a dam across the creek, can, under all the circumstances of the case, be considered as repugnant to the power to regulate commerce in its dormant state, or as being in conflict with any law passed on the subject."

And in *Cooley v. Board of Wardens,* 12 Howard 299, 13 L. ed. 996 (1851), that court in upholding pilotage regulations by Pennsylvania said, pp. 1004-5:

"* * * we are brought directly and unavoidably to the consideration of the question, whether the grant of the commercial power to Congress, did *per se* deprive the States of all power to regulate pilots. This question has never been decided by this court, nor, in our judgment, has any case depending upon all the considerations which must govern this one, come before this court. The grant of commercial power to Congress does not contain any terms which expressly exclude the States from

exercising an authority over its subject matter. If they are excluded it must be because the nature of the power, thus granted to Congress, requires that a similar authority should not exist in the States. If it were conceded on the one side, that the nature of this power, like that to legislate for the District of Columbia, is absolutely and totally repugnant to the existence of similar power in the States, probably no one would deny that the grant of the power to Congress, as effectually and perfectly excludes the States from all future legislation on the subject, as if express words had been used to exclude them. And on the other hand, if it were admitted that the existence of this power in Congress, like the power of taxation, is compatible with the existence of a similar power in the States, then it would be in conformity with the contemporary exposition of the Constitution (Federalist, No. 32), and with the judicial construction, given from time to time by this court, after the most deliberate consideration, to hold that the mere grant of such a power to Congress, did not imply a prohibition on the States to exercise the same power; that it is not the mere existence of such a power, but its exercise by Congress, which may be incompatible with the exercise of the same power by the States, and that the States may legislate in the absence of congressional regulations. *Sturges v. Crowinshield,* 4 Wheat. 193; *Moore v. Houston,* 5 Wheat. 1; *Wilson v. Black Bird Creek Marsh Co.,* 2 Peters 251.

"The diversities of opinion, therefore, which have existed on this subject, have arisen from the different views taken of the nature of this power.

But when the nature of a power like this is spoken of, when it is said that the nature of the power requires that it should be exercised exclusively by Congress, it must be intended to refer to the subjects of that power, and to say they are of such a nature as to require exclusive legislation by Congress. Now, the power to regulate commerce, embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some, like the subject now in question, as imperatively demanding that diversity, which alone can meet the local necessities of navigation.

"Either absolutely to affirm, or deny, that the nature of this power requires exclusive legislation by Congress, is to lose sight of the nature of the subjects of this power, and to assert concerning all of them, what is really applicable but to a part. Whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress. That this cannot be affirmed of laws for the regulation of pilots and pilotage is plain. The Act of 1789 contains a clear and authoritative declaration by the first Congress, that the nature of this subject is such, that until Congress should find it necessary to exert its power, it should be left to the legislation of the States; that it is local and not national; that it is likely to be the best provided for, not by one system, or plan of regulations, but by as many as the legislative discretion of the

several States should deem applicable to the local peculiarities of the ports within their limits."

In the case of *Simpson v. Shepard (Minnesota Rate Cases)*, 230 U. S. 352, 57 L. ed. 1511 (1913), Mr. Justice Hughes, after a detailed discussion of the principles involved and the limitations on state authority, thus summarized the rule governing the regulatory power of the states as to interstate commerce, pp. 1542-3:

> "But within these limitations there necessarily remains to the states, until Congress acts, a wide range for the permissible exercise of power appropriate to their territorial jurisdiction, although interstate commerce may be affected. It extends to those matters of a local nature as to which it is impossible to derive from the constitutional grant an intention that they should go uncontrolled pending Federal intervention. Thus, there are certain subjects having the most obvious and direct relation to interstate commerce, which nevertheless, with the acquiescence of Congress, have been controlled by state legislation from the foundation of the government because of the necessity that they should not remain unregulated, and that their regulation should be adapted to varying local exigencies; hence, the absence of regulation by Congress in such matters has not imported that there should be no restriction, but rather that the states should continue to supply the needed rules until Congress should decide to supersede them. * * * Our system of government is a practical adjustment by which the national authority, as conferred by the Constitution, is maintained in its full scope, without unnecessary loss of

local efficiency. Where the subject is peculiarly one of local concern, and from its nature belongs to the class with which the state appropriately deals in making reasonable provision for local needs, it cannot be regarded as left to the unrestrained will of individuals because Congress has not acted, although it may have such a relation to interstate commerce as to be within the reach of the Federal power. In such case, Congress must be the judge of the necessity of Federal action. Its paramount authority always enables it to intervene at its discretion for the complete and effective government of that which has been committed to its care, and, for this purpose and to this extent, in response to a conviction of national need, to displace local laws by substituting laws of its own. The successful working of our constitutional system has thus been made possible."

In *Port Richmond etc. Ferry Company v. Board of Chosen Freeholders*, 234 U. S. 317, 58 L. ed. 1330 (1914), a case specifically upholding state regulation of rates for ferriage between two states, the basic principle was thus stated by Mr. Justice Hughes, pp. 1335-6:

"Coming, then, to the question now presented,—whether a state may fix reasonable rates for ferriage from its shore to the shore of another state,—regard must be had to the basic principle involved. That principle is, as repeatedly declared, that as to those subjects which require a general system or uniformity of regulation, the power of Congress is exclusive; that, in other matters, admitting of diversity of treatment according to the special re-

quirements of local conditions, the states may act within their respective jurisdictions until Congress sees fit to act; and that, when Congress does act, the exercise of its authority overrides all conflicting state legislation. * * * It is this principle that is applied in holding that a state may not impose direct burdens upon interstate commerce, for this is to say that the states may not directly regulate or restrain that which, from its nature, should be under the control of the one authority, and be free from restriction save as it is governed by valid Federal rule. * * *

"* * * The present question is simply one of reasonable charges. It is argued that the mere fact that interstate transportation is involved is sufficient to defeat the local regulation of rates, because, it is said, that it amounts to a regulation of interstate commerce. But this would not be deemed a sufficient ground for invalidating the local action without considering the nature of the regulation and the special subject to which it relates. * * * The fundamental test, to which we have referred, must be applied; and the question is whether, with regard to rates, there is any inherent necessity for a single regulatory power over these numerous ferries across boundary streams; whether, in view of the character of the subject and the variety of regulation required, it is one which demands the exclusion of local authority. Upon this question we can entertain no doubt. It is true that in the case of a given ferry between two states there might be a difference in the charge for ferriage from one side, as compared with that for ferriage from the other. But this does not alter the aspect of

the subject. The question is still one with respect to a ferry, which necessarily implies transportation for a short distance, almost invariably between two points only, and unrelated to other transportation. It thus presents a situation essentially local, requiring regulation according to local conditions. It has never been supposed that because of the absence of Federal action the public interest was unprotected from extortion, and that in order to secure reasonable charges in a myriad of such different local instances, exhibiting an endless variety of circumstance, it would be necessary for Congress to act directly, or to establish for that purpose a Federal agency. The matter is illuminated by the consideration of this alternative, for the point of the contention is that, there being no Federal regulation, the ferry rates are to be deemed free from all control. The practical advantages of having the matter dealt with by the states are obvious, and are illustrated by the practice of one hundred and twenty-five years. And in view of the character of the subject, we find no sound objection to its continuance. If Congress at any time undertakes to regulate such rates, its action will, of course, control."

And in 1920 this same basic principle was specifically held by the court to be applicable to regulation of rates for gas moving in interstate commerce and sold direct to consumers. *Pennsylvania Gas Company v. Public Service Commission*, 252 U. S. 23, 64 L. ed. 434 (1920), *supra*. In that case, the court, upholding state regulation concluded, p. 443:

"The thing which the state Commission has undertaken to regulate, while part of an interstate transmission, is local in its nature, and pertains to the furnishing of natural gas to local consumers within the city of Jamestown, in the state of New York. * * *

"This local service is not of that character which requires general and uniform regulation of rates by congressional action, and which has always been held beyond the power of the states, although Congress has not legislated upon the subject. While the manner in which the business is conducted is part of interstate commerce, its regulation in the distribution of gas to the local consumers is required in the public interest, and has not been attempted under the superior authority of Congress."

It is interesting to note that, although in *East Ohio Gas Company v. Tax Commission of Ohio*, 283 U. S. 465, 75 L. ed. 1171, *supra*, the court disapproved the ruling of the *Pennsylvania* case that the sales direct to consumers were interstate sales, it carefully stated that the opinion in the *Pennsylvania* case was disapproved only "to the extent that it was in conflict" with the *East Ohio Gas* case decision holding the sales there involved to be intrastate in character.

In *Missouri v. Kansas Natural Gas Company*, 265 U. S. 298, 68 L. ed. 1027 (1924), the court, in denying state power to regulate sales of gas made for resale in interstate commerce and asserting such ruling was not inconsistent with its view in the *Pennsylvania* case and other decisions said, p. 1030:

"There is nothing in *Pennsylvania Gas Co. v. Public Service Commission*, 252 U. S. 23, 64 L. ed. 434, P.U.R. 1920E, 18, 40 Sup. Ct. Rep. 279, inconsistent with this view. There the Gas Company, a Pennsylvania corporation, transmitted gas from Pennsylvania into New York, and sold it directly to the consumers. The service to the consumers, which was the thing for which the regulated charge was made, was essentially local, and the decision rests upon this feature. * * * The commodity, after reaching the point of distribution in New York, was subdivided and sold at retail. The Landon Case, so far as this phase is concerned, differs only in the fact that the process of division and sale to consumers was carried on, not by the Supply Company, but by independent distributing companies.

"In both cases the things done were local, and were after the business in its essentially national aspect had come to an end. The distinction which constitutes the basis of the present decision is clearly recognized in the Landon Case. The business of supplying, on demand, local consumers, is a local business, even though the gas be brought from another state, and drawn for distribution directly from interstate mains; and this is so whether the local distribution be made by the transporting company or by independent distributing companies. In such case the local interest is paramount, and the interference with interstate commerce, if any, indirect and of minor importance."

In *Cloverleaf Butter Co. v. Patterson*, 315 U. S. 148, 86 L. ed. 754 (1942), the subject of state power where interstate commerce is involved was discussed by Mr.

Justice Reed, who, citing many authorities, summarized as follows, pp. 762-3:

> "It has long been recognized that in those fields of commerce where national uniformity is not essential, either the state or federal government may act. *Willson v. Black Bird Creek Marsh Co.* 2 Pet (US) 245, 7 L ed 412; *California v. Thompson*, 313 US 109, 114, 85 L ed 1219, 1221, 61 S Ct 930. Where this power to legislate exists, it often happens that there is only a partial exercise of that power by the federal government. In such cases the state may legislate freely upon those phases of the commerce which are left unregulated by the nation. But where the United States exercises its power of legislation so as to conflict with a regulation of the state, either specifically or by implication, the state legislation becomes inoperative and the federal legislation exclusive in its application.
>
> "When the prohibition of state action is not specific but inferable from the scope and purpose of the federal legislation, it must be clear that the federal provisions are inconsistent with those of the state to justify the thwarting of state regulation."

In *Parker v. Brown*, 317 U. S. 341, 87 L. ed. 315 (1943), the court in upholding California regulatory legislation, thus stated upon this subject, pp. 332-3:

> "When Congress has not exerted its power under the Commerce Clause, and state regulation of matters of local concern is so related to interstate commerce that it also operates as a regulation of that

commerce, the reconciliation of the power thus granted with that reserved to the state is to be attained by the accommodation of the competing demands of the state and national interests involved. * * *

"Such regulations by the state are to be sustained, not because they are 'indirect' rather than 'direct,' see *Di Santo v. Pennsylvania*, 273 US 34, 71 L ed 524, 47 S Ct 267, *supra*; cf. *Wickard v. Filburn*, 317 US 111, ante, 122, 63 S Ct 82, supra, not because they control interstate activities in such a manner as only to affect the commerce rather than to command its operations. But they are to be upheld because upon a consideration of all the relevant facts and circumstances it appears that the matter is one which may appropriately be regulated in the interest of the safety, health and well-being of local communities, and which, because of its local character and the practical difficulties involved, may never be adequately dealt with by Congress. Because of its local character also there may be wide scope for local regulation without substantially impairing the national interest in the regulation of commerce by a single authority and without materially obstructing the free flow of commerce, which were the principal objects sought to be secured by the Commerce Clause."

The Commission believes there can be no real doubt as to the importance and predominance of the local interest in the regulatory problems involved. The state is vitally interested in the welfare of its industrial gas

users as well as that of its residential and commercial users. It is, in the opinion of this Commission, a specious argument to assert that because competition with other fuels may fix a maximum rate level for such sales, there is no public interest in regulation of sales to such class of consumers. Obviously matters of discrimination, adequacy of service and the level of rates for such service are all ones which warrant and call for the exercise of governmental regulatory power in respect of this class as well as other classes. The further fact that regulation of distribution of gas to the industrial class of consumers cannot, in the public interest, be divorced from that of distribution to other classes of consumers is amply shown by the facts in the record in this case. The importance of these factors has been pointed out in the opinions in *Re Service Gas Company*, 15 P. U. R. (N. S.) 202 (Penn. 1936) and *Re Louisiana-Nevada Transit Company*, 32 P. U. R. (N. S.) 219 (Ark. 1939), cases before state commissions; and factors affecting the problem and calling for careful further legislative consideration, both state and federal, are the subject of an extensive analysis by Mr. Justice Jackson in his concurring opinion in *Federal Power Commission v. Hope Natural Gas Company*, 320 U. S. 591, 88 L. ed. 333, 358-376 (1944), *supra*.

The Commission concludes that the distribution in Indiana by Panhandle of natural gas direct to consumers is subject to regulation by this Commission under the laws of this state.

## ORDER

IT IS THEREFORE ORDERED BY PUBLIC SERVICE COMMISSION OF INDIANA that each and all of the objections made by Panhandle Eastern Pipe Line Company, the respondent in this cause, to any of the evidence offered in this cause (except such objections as have heretofore been specifically and finally sustained by the Commission) shall be, and the same and each of them are hereby, overruled; and that all such evidence objected to shall be and is hereby received in evidence in this cause.

IT IS FURTHER ORDERED that said Panhandle Eastern Pipe Line Company shall, within twenty (20) days after receipt by it of a copy of this order, file with the Bureau of Tariffs of this Commission, in the form prescribed by this Commission, tariffs covering rates, rules and regulations appertaining to any and all sales of natural gas by it direct to ultimate consumers within the State of Indiana.

IT IS FURTHER ORDERED that said Panhandle Eastern Pipe Line Company shall, within sixty (60) days after receipt by it of a copy of this order, file with this Commission an annual report, in the prescribed form, for each of the calendar years 1942, 1943 and 1944, and shall hereafter, when and as the same become due and so long as it continues to distribute gas direct to any consumer in Indiana, file with this Commission, on the prescribed form, an annual report for each succeeding year.

IT IS FURTHER ORDERED that said Panhandle Eastern Pipe Line Company shall, within sixty (60) days after the receipt by it of a copy of this order, file with this Commission copies (certified by one of its fiscal officers as true copies) of (a) each and all statements appertaining to its property in such form as filed by it with the Federal Power Commission under and pursuant to Order No. 73 of said commission, adopted April 9, 1940, captioned "Order Requiring Submission of Supplemental Data in Connection with Gas Plant Instruction 2-D of the Uniform System of Accounts under the Natural Gas Act," and (b) each and all journal entries or proposed journal entries filed by it with said Federal Power Cmmission under and pursuant to the requirements of Subdivision B of Account No. 391 "Gas Plant Purchased" of the "Uniform System of Accounts Prescribed for Natural-Gas Companies Subject to the Provisions of the Natural Gas Act" prescribed by said commission, or of Subdivision B of Account No. 392 "Gas Plant Sold" of said Uniform Classification of Accounts.

IT IS FURTHER ORDERED that this Commission reserve for subsequent determination in this investigation the matter of what, if any, additional reports and information in respect of the property or operations of said Panhandle Eastern Pipe Line Company this Commission should require to be filed with it by said company.

IT IS FURTHER ORDERED that this Commission

reserve for subsequent determination in this investigation the steps, if any, to be taken by this Commission if Panhandle shall, without first securing a Necessity Certificate under the provisions of Section 97A of the Public Service Commission Act, commence the supplying of natural gas direct to any consumer in Indiana who was not so served by it on February 26, 1945, and who is located in a rural area as defined in said act.

IT IS FURTHER ORDERED that the secretary of this Commission shall promptly after the entry of this order (a) mail, first class and registered mail, to said Panhandle Eastern Pipe Line Company at its principal office in Indiana, 601 Illinois Building, 17 West Market Street, Indianapolis 4, Indiana, and also at its principal executive office at 135 South LaSalle Street, Chicago 3, Illinois, copies of this order and of the rules and regulations of this Commission governing the construction and filing of schedules of rates, rules and regulations by public utilities other than interurban railways, (b) mail, as printed matter, postage prepaid and insured, to said Panhandle Eastern Pipe Line Company at its said office in Chicago, Illinois, six sets of the form of annual report prescribed by this Commission, and (c) mail, as first class mail and postage prepaid, to counsel of record for said Panhandle Eastern Pipe Line Company, and to each of the other parties to this proceeding and their respective counsel of record, copies of this order; and that said secretary shall forthwith thereafter file in this cause his certificate of such mailings.

IT IS FURTHER ORDERED that said Panhandle Eastern Pipe Line Company shall, on or before twenty (20) days after the date of this order, pay into the Treasury of the State of Indiana, through the Secretary of this Commission, the sum of $23.59, said amount being the expenses incurred by this Commission in this investigation (including cost of publication of notices of hearing).

YODER, CARLSON AND CANNON CONCUR:

APPROVED: November 21, 1945.

## APPENDIX "D"

SUPPLEMENTAL ORDER OF THE PUBLIC SERVICE COMMISSION OF INDIANA

April 9, 1946

BEFORE THE PUBLIC SERVICE COMMISSION OF INDIANA

In the Matter of the Investigation by the Commission in Respect of the Distribution by PANHANDLE EASTERN PIPE LINE COMPANY, as a Public Utility, of Natural Gas to Consumers within the State of Indiana.

Cause No. 16741

First Supplemental Order

Approved: April 9, 1946

By the COMMISSION:

On November 21, 1945, this Commission entered its order (Original Order) in the above entitled cause wherein, among other things, it ordered the respondent herein, Panhandle Eastern Pipe Line Company (Panhandle), within times prescribed in such order, to file with the Bureau of Tariffs of the Commission tariffs covering rates, rules and regulations appertaining to any and all sales of natural gas by it direct to ultimate consumers within the State of Indiana, and to file with the Commission certain designated annual reports, and to file with the Commission certain information appertaining to the plant and property of Panhandle. Panhandle did not comply with any of the provisions of the Original Order, but on or about January 2, 1946 took an appeal (the Appeal) from said order to the Randolph Circuit Court. The Appeal was docketed as Cause No. 5440 in said court.

On March 21, 1946 respondent filed in this Cause No. 16741 a document captioned "Offer of Respondent to Fur-

nish Information Designated by Commission Order Dated November 21, 1945, on Condition that the Same be Accepted by the Commission as Information only and that Said Order Dated November 21, 1945 be so modified as to State Unequivocally that it Involves no Assertion of any Jurisdiction or Authority of the Commission to Regulate the Business of Respondent of Selling and Directly Delivering Natural Gas Transported in Interstate Commerce to Industrial Consumers in the State of Indiana, and Seeks the Filing of the Reports and Documents Designated in Said Order for Information Purposes Only" (Respondent's Offer). The content of Respondent's Offer is as follows:

"Comes now Panhandle Eastern Pipe Line Company and respectfully shows this Honorable Commission:

"1. That this Respondent has at all times throughout this proceeding asserted and insisted, and continues to assert and insist, that it is engaged solely in interstate commerce in the State of Indiana, that this Commission consequently has no jurisdiction of Respondent or its business, and that any statute of Indiana construed to purport to confer such jurisdiction as applied to Respondent and its business is void because in violation of Article I, Section 8 (3) of the Constitution of the United States.

"2. That Respondent has asserted and continues to assert such position in the proceeding to set aside and vacate such order in Cause No. 5440 in the Randolph Circuit Court entitled *Panhandle Eastern Pipeline Company* v. *The Public Service Commission, et al.*, which cause has been heretofore tried in said Court and taken under advisement.

"3. That at the time said action was commenced Respondent in good faith understood and believed and still believes that said order dated November 21, 1945 constituted and constitutes an assertion of the right and authority to regulate the rates and service of Respondent in its business of selling and directly deliver-

ing natural gas transported in interstate commerce to certain industrial consumers as shown by the record in said cause which business Respondent contends is protected from such regulation by Article I, Section 8 (3) of the Commerce Clause.

"4. That this Commission has not asserted by arguments and brief in said action in the Randolph Circuit Court that the papers and documents which Respondent is ordered to file by said order dated November 21, 1945 are sought by it for information purposes only and not as an assertion of jurisdiction to regulate Respondent's rates and service for direct sales and deliveries to industrial consumers within the State of Indiana.

"5. Respondent denies that the Commission is authorized by law to require the filing of the papers and documents ordered filed by said order dated November 21, 1945 for the reason that the same are not relevant to the exercise of any jurisdiction which the Commission possesses and no part of the business of Respondent is subject to its jurisdiction. However, Respondent has no desire to withhold from the Commission any matters designated in said order which are desired solely for information purposes, even though the preparation and filing of the same hereafter will be burdensome to Respondent, *provided* the filing of the same would in no way prejudice its position that the Commission has no jurisdiction or authority to regulate its said business in the event that any attempt to regulate the same should hereafter be made by the Commission. In view of the assertions heretofore made in said order and now made by the Commission in arguments and briefs in said cause in the Randolph Circuit Court that the Commission has such regulatory jurisdiction, Respondent cannot be certain that it would not be prejudiced in said position if it should comply with the order as now entered unless the Commission by modification thereof specifically states in its order that

said papers and documents are sought for information purposes only, and that said order is not to be construed as an assertion of any regulatory jurisdiction of Respondent or its business.

"6. Respondent therefore now offers to file with the Commission all papers and documents specified in the order dated November 21, 1945, *provided* the Commission desires the same for information purposes only and not as an assertion of regulatory jurisdiction of Respondent's business, and *provided* said order is so modified or such further order is entered by the Commission as to preclude the possibility of any contention hereafter that

Respondent will be in any manner prejudiced in its right to contest the jurisdiction of the Commission to regulate its said business in the event the Commission shall hereafter assert the right, power, authority or jurisdiction to regulate the same.

"7. In the event that the order of the Commission dated November 21, 1945 is so modified or such further order is entered as to protect Respondent from any prejudice in its right to contest hereafter the jurisdiction and authority of the Commission to regulate its said business in the event that the Commission shall hereafter assert the right, power, authority or jurisdiction to regulate the same, Respondent will furnish the information designated in said order dated November 21, 1945 within such reasonable time as shall be designated by the Commission and will dismiss said action now pending in the Randolph Circuit Court without prejudice and at its costs.

"8. While Respondent is willing to afford the Commission a full opportunity to consider and accept or reject the proposal herein made, attention is called to the fact that the time for filing Respondent's reply brief in said cause in the Randolph Circuit Court will expire on Thursday, March 28, 1946 and that said cause will then be ready for decision by that Court."

On or about March 28, 1946 Panhandle filed in the Appeal its application for leave to file a supplemental complaint relative to Respondent's Offer.

The Commission certainly has no desire that any of the parties to this cause, or the court before whom the Appeal is pending, or any consumer, public utility or other interested person, should be in any doubt as to the conclusions to which the Commission came in this cause as to its regulatory jurisdiction over sales direct to Indiana consumers of natural gas that has moved into the state in interstate commerce. The Commission thought that position was made as clear as language could make it by the findings and opinion in the Original Order. Though not required by statute to incorporate in an order either findings or opinion, the Commission did in the Original Order, because of the importance of this matter and to the end that the parties should be fully informed as to its conclusions, set forth in detail both its findings and its opinion as to its regulatory control. After an extended discussion of its views, the Commission said unequivocally therein (p. 82) that it concluded "that the distribution in Indiana by Panhandle of natural gas direct to consumers is subject to regulation by this Commission under the laws of this state". Those laws place on the Commission, as the state regulatory agency, the power and duty, whenever action is necessary in the public interest, to make reasonable regulations of rates and service. This duty the Commission proposes to exercise when and as public interest requires action. The conclusion above quoted did and does express its position on this question.

The Commission has consistently reiterated this position in two other regulatory proceedings in each of which Panhandle was a party or had representatives present.

In *Panhandle Eastern Pipe Line Company, et al.*, Docket Nos. G-661 and G-688 before the Federal Power Commission, being proceedings involving the question whether Panhandle would be permitted by regulatory authorities to transport through its pipe line system large additional amounts of gas to be sold to a new industrial consumer, the Commission intervened in the interest of the consumers in

the State of Indiana and opposed the use of the pipe line for such transportation on the ground that such system did not have sufficient capacity even to supply adequately existing consumers. In the hearing in those proceedings in January 1946, the federal commission called for, and the full federal commission listened to, arguments on the jurisdictional issue in which the Commission, as an intervenor, participated. In that argument the Commission stated:

"• • • The Indiana Commission believes that the Natural Gas Act has completely closed the gap in the regulation of gas moving in interstate commerce for public distribution.

"Assuming adequate state law, we believe that between the States and the federal agency the entire field has been covered. We have given much and careful consideration to the question of the division of federal and state regulatory powers in this interstate gas field, and it is our studied conviction that we have been entrusted, under the powers remaining with us under our state statutes, with the full and complete regulation of all direct sales to consumers, residential, commercial or industrial, of natural gas moving in interstate commerce.

"This jurisdiction, we believe, extends both to the consumer rates and service of such sales, and includes the control and regulation by the State of those facilities of movement, metering and regulating which appertain *solely* to the direct customer service.

"On the other hand, we recognize fully your own jurisdiction and control over *the interstate transportation* of all such gas by the natural gas company, (1) until and including the sale in cases of sale for resale, and (2) up to and including the point where the gas is broken out of the interstate stream and placed in facilities used solely for the local sale, in cases of gas sold direct. For example, in a direct industrial sale by a pipe line company, such as the one in issue here, it is our view that the facilities beyond the valve take off in the transmission line are facilities of the

local service and subject to state control; but that the facilities before such point, including the valve and other facilities used in the breaking out from the interstate stream of the gas to be sold to a consumer direct, are facilities subject to your jurisdiction and control.

"And we recognize, too, your full control and jurisdiction of the gas while in its interstate movement even though it is to be sold direct to a consumer; and your full right and power to determine the question of whether or not such facilities used or useful for that interstate transportation may in the public interest be used to move such gas to the point where our regulation begins, or must, because of prior rights of other consumers, inadequacy of facilities or other adequate causes, be used for other transportation.

"We believe this construction of the line of demarcation between state and federal powers is the one fixed by the Natural Gas Act. We believe the point of division of powers between you and us has been wisely so placed.

"We believe that under that division you have the full and complete authority in the instant case to determine whether or not this volume of gas which Panhandle Eastern Pipe Line Company proposes to sell direct can be brought to, or broken out at, the point where state regulation would pick up.

"We are confident that in exercising that jurisdiction and determining the issues, you will give fair and full consideration to the rights and protection of all areas and all classes of consumers along this pipe line who are dependent upon its capacity for such gas as they need to meet their requirements for this essential public utility service. • • •"

The Commission also participated on February 19 and 20, 1946, at the Chicago hearings in the general Natural Gas Investigation (Docket No. G-580), which is now being conducted by the Federal Power Commission. At that hearing, Panhandle had representatives present. The Com-

mission there again stated its position as to its regulatory power over gas sold direct to Indiana consumers as follows:

"* * * Adequate regulation of this supply, giving assurance that it will be available to consumers in the state, continuously and in adequate amounts, at fair and reasonable prices, and without unwarranted discriminations either between classes of users or those within a class, is of vital importance to the welfare of the state and its citizens. * * *

"We believe that the transportation and sale of natural gas is a business affected with a public interest, that it is inherently and necessarily, if economic waste is to be avoided, generally monopolistic in character, and that full and adequate regulation thereof is essential if the public interest is to be protected. We believe this regulation and protection can best be afforded and local interests best dealt with through the existing policy of the Natural Gas Act of leaving to state regulative authority the control over rates and service in cases of all direct consumer sales, and placing in the federal agency the full control over the interstate transportation of the gas and over its sale for resale. We believe the public interest can and will be best served through the cooperative efforts of these agencies as each functions within its own sphere. * * *

"As we have before said, we believe that Congress has left with each state the control and regulation of direct sales to consumers within such state. We think, state law being adequate, this regulatory power exists in cases of all classes of direct service to consumers, residential, commercial and industrial, small or large. We believe the unification of regulation of all direct consumer sales in the state regulatory agency is a wise and sound one, and one that the legislative history of the Natural Gas Act shows clearly to have been the congressional intent. We think that this line of demarcation of regulatory control is clearly one permitted by the federal constitution and that it should be fully preserved in any legislation amendatory to the act."

Appearing as a participant in that hearing, the Commission further stated in answer to specific questions relative to direct consumer sales, as follows:

> "In fact, our Commission has gone on record, as most of you probably well know, holding that we have legislative authority which we propose to exercise governing all sales, irrespective of whether those sales are from a distributing utility or direct sales from a pipe line."

The position of the Commission, as determined from its investigation in this cause, was and is that it has jurisdiction over sales direct to consumers by Panhandle of natural gas that has moved into the state in interstate commerce; that Panhandle has the duty and obligation to file with the Commission, and keep on file, the tariffs, reports and accounting information required of public utilities by the statutes of the State of Indiana and the Commission's rules and regulations now in effect or from time to time promulgated; that the only lawful rates, rules and regulations for natural gas service by Panhandle direct to consumers in Indiana would be those filed by Panhandle with the Bureau of Tariffs of the Commission and in effect pursuant to the provisions of the Public Service Commission Act and the Commission's rules and regulations promulgated thereunder; contained in such tariffs, reports and other data for any and all lawful purposes necessary or advantageous in the performance by it of its duties and responsibilities as the state regulatory agency of public utility services; and that the Commission will, if, when and as the public interest requires, regulate rates and service of natural gas sales by Panhandle direct to Indiana consumers, and believes that it has authority so to do.

For some reason counsel for Panhandle, in their brief and in their oral argument in the Appeal, asserted that the Commission has no use for and does not need the information required to be filed by the Original Order for any purpose or use other than the regulation of sales to industrial consumers; and counsel have dogmatically asserted that "if no such right of regulation exists, the order made

is unlawful and should be vacated and set aside." (Bf., P. 9.) Such statements are not correct factually, and in the opinion of the Commission, the conclusion of counsel is wholly erroneous. The actual experience of the Commission in connection with the two federal proceedings above referred to have amply demonstrated to it the need of such and other information for numerous purposes. Members of the Attorney General's staff both in their oral argument and in their subsequent brief in the Appeal demonstrated the fallacy of counsel's claim and pointed out some of these purposes. Counsel apparently now wants that demonstration translated into an abandonment of the Commission's expressed position of regulatory power. The Commission has been particularly concerned lest failure to reiterate its position might be taken as silent approval of their assertions. Such an assumption would be opposite to the fact, but the Commission has concluded it should affirmatively point this out in acting on Respondent's Offer.

The Commission seeks the information directed to be filed by the Original Order for any and all uses to which it may be put by the Commission in the exercise of its statutory functions and the performance of its duties. Its use will not be limited to rate and service regulation of direct sales to Indiana consumers, but this broader use will not exclude the use for rate and service regulation of such sales. An example of this broader use appears in connection with the two proceedings above referred to. Certain of the information needed for participation in those proceedings, and for determination of the necessity of such participation, would have been available if the Original Order had been complied with. Experience in those proceedings also has shown a necessity for broadening the information called for in annual or periodic reports. The importance to the public of a continuous check on natural gas pipe line capacity and use has been strongly impressed on the Commission by the experiences of the past winter. Action by regulatory agency in advance of an actual break-down of service is a greater aid to the public than remedial action after break-down. Conditions arising this winter have spot lighted the essentialness of

vigilance by the state regulatory agency if an adequate supply of gas is to be had for Indiana consumers. Severe, and what the Commission believes to have probably been arbitrary and discriminatory, curtailments in the gas supply to Indiana industrial consumers using gas from the Panhandle system, were made by Panhandle during this past winter. The complaints to the Commission by such curtailed consumers, and their reports as to the affect of the curtailments on the production operations and employment in their establishments, convinced the Commission of the seriousness of the situation from the public standpoint. It actively sought and obtained assistance from the Federal Power Commission in respect of lessening these curtailments. During the same period facts came to light which disclosed that Panhandle was attempting to take on an additional large industrial load on its system. The supplying of such load would have seriously impaired the existing service to industrial consumers in Indiana. On behalf of the consuming public, the Commission appeared as intervenors in the investigation of the Federal Power Commission of this matter (Dockets No. G-661 and No. G-688), but most of the factual information had to be developed from examinations and studies of transmission capacities and loads which was in the files of the Federal Power Commission, and this handicapped the Commission in discovering the problem and dealing with it.

The position of the Commission is that its functions include, when and as necessary in the public interest, the regulations of rates and service in cases of sales directly to Indiana consumers. There are many purposes and uses, in the exercise of the regulatory and other duties placed upon the Commission by law, for which the Commission shall undoubtedly make use of the data which are required to be supplied now and from time to time by Panhandle under the Indiana statute and the Original Order. Some of those uses were pointed out by the Attorney General both in his oral argument and in the brief subsequently filed. It is not necessary to repeat or expand the list. The uses which will be made of the information supplied will be all such as the public interest require. Certainly without the information the Commission is and will be

handicapped in the exercise of many of its regulatory functions and the public, in whose interest the Commission functions, is injured thereby.

The Commission desires to add a word as to the reservation in the Original Order relative to further action by the Commission if Panhandle undertook to sell gas direct to DuPont without complying with Section 97A of the Public Service Commission Act. The issue in such supplemental investigation would involve the provisions of Section 97A of the Act, and issue additional to those dealt with in the Original Order. Panhandle had not at the time of the hearings or the order commenced any service to DuPont. In such a situation, the Commission had no power to order anything in respect of DuPont at that time. The Commission was not called upon to assume that, in the light of the views expressed in the Original Order, Panhandle would ignore the state and commence direct service to DuPont merely upon its own ideas of the scope of Section 97A. Panhandle could have submitted that question to the Commission for determination before it commenced the service, and it can still do so if it sees fit. In any such petition, Panhandle can assert a lack of jurisdiction, and any order made, if not acceptable to Panhandle, is appealable to the Courts. Such procedure is not unknown to Panhandle. Panhandle took exactly that kind of a course in an application to the Federal Power Commission which is docketed as Docket No. G-693 and in which docket the Commission was a party intervenor. But with the State of Indiana, Panhandle saw fit to ignore the statutory provisions, and saw fit to commence the service and then advise the Commission that it had done so. In that situation, Panhandle has, with its eyes open, assumed the risks of the course it selected. There is nothing in the Original Order that in any way creates or increases that risk. If, however, Panhandle does not see fit promptly to file a petition for a Necessity Certificate under Section 97A, the Commission proposes to proceed at the earliest date consistent with its other duties and the demands made by them upon it and its staff, with an investigation of the status of Panhandle's DuPont service in the light of Section 97A.

It is therefore ordered by the Public Service Commission of Indiana that the request contained in Respondent's Offer that the Commission modify, change or limit the scope of the Original Order be and the same is hereby denied; that Respondent's Offer be, and the same is hereby, rejected by the Commission; that a conditional filing, as proposed by Panhandle in Respondent's Offer, of the tariffs of rates, rules and regulations, the annual reports and the accounting information, or any of them; required to be filed by Panhandle by and under the Original Order will not constitute compliance with the Original Order, and that the tariffs of rates, rules and regulations, the annual reports and the accounting information, when filed, shall be deemed to be on file for, and to be available for use by the Commission for, all purposes and uses required or permitted by the provisions of the Public Service Commission Act and the rules and regulations of the Commission promulgated thereunder, including, but without limitation, the use thereof in and in connection with the regulation of rates and service appertaining to the supplying of natural gas by Panhandle direct to consumers within the State of Indiana.

It is further ordered that the Secretary of the Commission shall promptly after the entry of this first supplemental order (a) mail, first class and registered mail, to Panhandle at its principal office in Indiana, 601 Illinois Building, 17 West Market Street, Indianapolis 4, Indiana, and also at its principal executive office at 135 South LaSalle Street, Chicago 3, Illinois, copies of this first supplemental order, and (b) mail, as first class mail and postage prepaid, to counsel of record for Panhandle, and to each of the other parties to this proceeding and their respective counsel of record, and to the honorable judge of the Randolph Circuit Court at Winchester, Indiana, copies of this first supplemental order; and that said Secretary shall forwith thereafter file in this cause his certificate of such mailings.

Yoder, Carlson, and Cannon concur. Approved: April 9, 1946.

I hereby certify that the above is a true and correct copy of order as approved. ——, ——, Secretary to Commission.

## APPENDIX "E"

Indiana Acts 1913, ch. 76, Sec. 97 as added by Acts 1945, ch. 53, Sect. 1, p. 110 (Burns' Ind. Stat. Ann. 1933, 1945 Pocket Supp. Sect. 54-601a):

Chapter 53

An Act to amend an act entitled "AN ACT concerning public and municipally owned utilities, authorizing municipalities to hold, own, acquire, construct and operate utilities and to issue bonds to pay therefor, providing the manner in which such municipalities may acquire and pay for such utilities, abolishing the railroad commission of Indiana and conferring the powers of the railroad commission on the public service commission," approved March 4, 1913, as said title was amended by Chapter 190 of the Acts of 1933, approved March 8, 1933, by adding thereto a new section numbered section 97a, providing for the granting, transfer and revocation of certificates of public convenience and necessity for the rendering of gas utility service direct to consumers in rural areas in the State of Indiana, and declaring an emergency. (H. 295. Approved February 26, 1945.)

Public Service Commission Act—New Section—Section 97A—Meaning of Terms—Concerning Granting, Transfer and Revocation of Certificates of Public Convenience and Necessity for Gas Utility Service Direct to Consumers in Rural Areas—Amendment.

Section 1. Be it enacted by the General Assembly of the State of Indiana: That the above entitled act be and is hereby amended by adding thereto, immediately following section 97 thereof, a new section to read as follows:

Sec. 97A. (a) When used in this section, unless the context otherwise requires

(1) the term "gas" means and includes natural gas, artificial or manufactured gas, and mixed gas, or any of them;

(2) the term "necessity certificate" means a certificate of public convenience and necessity issued by the commission

pursuant to the provisions of this section, which certificate shall be deemed an indeterminate permit;

(3) the term "rural area" means territory within the State of Indiana that is outside the corporate limits of a municipality;

(4) the term "gas utility" means and includes any public utility selling or proposing to sell or furnish gas directly to any consumer or consumers within the State of Indiana for his, its or their domestic, commercial or industrial use; and

(5) the term "gas distribution service" means the furnishing or sale of gas directly to any consumer within the State of Indiana for his or its domestic, commercial or industrial use.

(b) It is hereby declared that in order adequately to protect the public interest in the distribution of gas to consumers within the State of Indiana, it is necessary and desirable that to the extent provided herein the holding of necessity certificates should be required as a condition precedent to the rendering of gas distribution service in rural areas of the State of Indiana.

(c) After the date that this section becomes effective, no gas utility shall commence the rendering of gas distribution service in any rural area in the State of Indiana in which it is not actually rendering gas distribution service at the effective date hereof, without first obtaining from the commission a necessity certificate authorizing such gas distribution service, defining and limiting specifically the rural area covered thereby, and stating that public convenience and necessity require such gas distribution service within such rural area by such gas utility; and no gas utility hereby required to hold a necessity certificate for any rural area shall render gas distribution service within such a rural area to any extent greater than that authorized by such necessity certificate or shall continue to render gas distribution service within such rural area if and after such necessity certificate has been revoked or transferred as in this section provided.

(d) Whenever any gas utility proposes to commence the rendering of gas distribution service in any rural area

in which it is not actually rendering such service at the date on which this section becomes effective, it shall file with the commission a verified application for a necessity certificate covering such service by it. The commission shall, by regulations, prescribe the form of application and such application shall conform to such prescribed form. Within a reasonable time after the filing of any such application the commission shall fix a time and place for public hearing theron. Notice of such hearing shall be given in such manner and to such persons as is from time to time required by law or by the regulations of the commission. Such hearing shall be held in the manner prescribed for a hearing in sections 57 to 71, both inclusive, of this act, and the provisions of such sections so far as applicable shall apply to such hearing. Any person interested in such proceedings, including without limiting the generality of the foregoing any gas utility rendering gas distribution service within the general service area (including territory within and without municipalities) of which the rural area covered by the application may reasonably be deemed a part, shall be permitted to appear either in person or by attorney and offer evidence in support of or opposition to the application. The applicant shall, at all times, have the burden of proving by evidence each of the matters hereinafter specified as necessary to be found by the commission before a necessity certificate shall be issued by it. If the commission shall find from the evidence, including such evidence, if any, as the commission may cause to be introduced as a result of any investigation which it may have made relative to the matter, that the applicant therefor has lawful power and authority to obtain such necessity certificate and to render the proposed gas distribution service if it obtains such certificate, that he or it has the financial ability to provide the proposed gas distribution service, that public convenience and necessity require the rendering of the proposed gas distribution service, and that the public interest will be served by the issuance of the necessity certificate to him or it, the application shall be granted, subject to such terms, restrictions and limitations as the commission shall determine to be necessary and desirable in the public interest; otherwise the application shall be denied.

(e) Upon approval by the commission given after notice and public hearing given and held in the manner provided for in subdivision (d) of this section in cases of applications for necessity certificates, but not otherwise, any necessity certificate may (1) be sold, assigned, leased or transferred by the holder thereof to any person, firm or corporation to whom a necessity certificate might be lawfully issued, or (2) be included in the property and rights encumbered under any indenture of mortgage or deed of trust of such holder.

(f) Any necessity certificate may, upon application by the holder thereof to the commission, be revoked by the commission, in whole or in part, after notice given and hearing held in the manner provided for in cases of applications for necessity certificates. Any necessity certificate may, after notice given and hearing held in the manner provided for in cases of applications for necessity certificates, be revoked by the commission, in whole or in part, for the failure of the holder thereof to comply with any applicable order, rule or regulation prescribed by the commission in the exercise of its powers under this act, or with any term, condition or limitation of such necessity certificate.

Emergency.

Sec. 2. Whereas an emergency exists for the immediate taking effect of this act, the same shall be in full force and effect from and after its passage.